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SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

AGENCY: Surface Transportation Board, DOT.

ACTION: Final rules.

SUMMARY: The Surface Transportation Board (STB or Board) adopts final regulations governing proposals for major rail consolidations. These new rules substantially increase the burden on applicants to demonstrate that a proposed transaction would be in the public interest, by requiring them, among other things, to demonstrate that the transaction would enhance competition where necessary to offset negative effects of the merger, such as competitive harm or service disruptions.

EFFECTIVE DATE: These rules are effective July 11, 2001.

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SUPPLEMENTARY INFORMATION:

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## BACKGROUND

In March 2000, we concluded that our regulations governing applications for approval of railroad mergers,[1] at 49 CFR part 1180, subpart A (49 CFR 1180.0 — 1180.9),[2] were outdated and inadequate to address future major rail merger proposals, given the limited merger-related benefits still obtainable through the elimination of overcapacity in the industry, the significant service disruptions that had been associated with recent rail mergers and the prospect that future major merger proposals would trigger other proposals that, if approved, could result in the consolidation of the Class I railroad industry into only two North American transcontinental railroads.[3] Accordingly, we instituted this 15-month, 3-stage rulemaking proceeding to develop new, more up-to-date, merger regulations.

In the advance notice of proposed rulemaking (ANPR),[4] we sought comments and proposals on a wide range of merger-related issues, including, but not limited to: competitive issues; downstream effects; the important role of smaller railroads in the rail network; service performance; the types of benefits to be considered in the balancing test, and how we should monitor those benefits; how we should view alternatives to mergers; employee issues; and international trade and foreign control issues.[5] We also indicated that we would be making technical updates or corrections to the merger rules, and we invited commenters to offer suggestions for modifying the provisions of 49 CFR part 1180.

In October 2000, we issued a notice of proposed rulemaking (NPR) proposing a new merger policy statement and rules that would require merger applicants to bear a heavier burden

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[1] Terms such as "merger," "control," "transaction," and "consolidation" are generally used interchangeably herein.

[2] All references to the United States Code (U.S.C.) are to the provisions of Title 49; and all references to the Code of Federal Regulations (CFR) are likewise to the provisions of Title 49.

[3] Public Views on Major Rail Consolidations, STB Ex Parte No. 582 (STB served Mar. 17, 2000).

[4] Abbreviations used in this decision are listed in Appendix A. Short case citation forms can be found in Appendix B.

[5] Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served Mar. 31, 2000), 65 FR 18021 (Apr. 6, 2000).

in showing that a major merger proposal is in the public interest.[6] Parties were again invited to submit comments, replies, and rebuttal.

We have received comments and suggestions from a wide range of parties: Class I railroads and related interests (see Appendix C); regional and shortline railroads and related interests (see Appendix D); passenger railroads and related interests (see Appendix E); rail labor interests (see Appendix F); federal and foreign agencies (see Appendix G); regional and local interests (see Appendix H); port interests (see Appendix I); members of Congress (see Appendix J); NITL, CURE, & ARC (see Appendix K); coal interests (see Appendix L); chemicals, plastics, and related interests (see Appendix M); agricultural interests (see Appendix N); minerals and related interests (see Appendix O); forest products, lumber, and paper interests (see Appendix P); Canadian shipper interests (see Appendix Q); transportation intermediaries (see Appendix R); and miscellaneous parties (see Appendix S).

**OVERVIEW**

These new rules reflect our concerns about what an appropriate rail merger policy should be in light of the declining number of Class I railroads, the elimination of the industry's excess capacity, and the serious transitional service problems that have accompanied recent major rail consolidations. We have received comments from over 100 parties in this proceeding, reflecting the wide-ranging views of railroads, shippers, rail labor, federal and foreign agencies, members of Congress, and others. The detailed summaries of the comments that are attached to this decision reflect the numerous thoughtful statements that we have received. The comments have been very helpful to us in formulating these guidelines covering the content of future applications, public participation in the process, and how we should assess future proposals. We believe that our new merger policy statement and rules provide an appropriate framework for considering future major railroad merger proposals.

Our revised rules reflect a significant change in the way in which we will apply the statutory public interest test to any major rail merger application. Because of the small number of remaining Class I railroads, the fact that rail mergers are no longer needed to address significant excess capacity in the rail industry, and the transitional service problems that have accompanied recent rail mergers, we believe that future merger applicants should bear a heavier burden to show that a major rail combination is consistent with the public interest. Our shift in policy places greater emphasis in the public interest assessment on enhancing competition while ensuring a stable and balanced rail transportation system.

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[6] Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1) (STB served Oct. 3, 2000), 65 FR 58974 (Oct. 3, 2000).

Toward this end, we will require applicants to submit a service assurance plan with their initial application and operating plan. Applicants also will be expected to include measures for preserving competition wherever feasible, including effective plans to keep open major existing gateways and to preserve opportunities to challenge segment rates in bottleneck situations. Our new rules reflect an intention on our part to offset, through conditions for competitive enhancements, those merger-related harms that cannot be directly or effectively mitigated. Such competitive enhancements could include, but would not be limited to, reciprocal switching arrangements, trackage rights, or elimination of "paper barriers" on interchange by shortline carriers. We will also analyze the impact of potential future responsive mergers, and issues related to mergers of U.S. and foreign carriers. And we are codifying our recent practice of formal oversight for a period of not less than 5 years following each merger.

In the NPR, we indicated that we would require applicants in future merger proceedings to present proposals that enhance, not merely preserve, competition, in order to secure our approval. Many parties have asked for greater precision about the scope of competitive enhancements that would be necessary. But shippers and carriers fundamentally disagree on the degree of enhancement that should be expected. The Class I railroads argue that it would be both unlawful and inappropriate for us to require applicants to offer any competitive enhancements as part of their merger proposals. In contrast, many shippers and shipper groups want us to require applicants to provide a panoply of specific competitive enhancements, essentially providing relief for all exclusively served shippers of an applicant railroad, in order to obtain approval of a merger proposal.[7]

Neither of these extremes is appropriate. Ultimately, the quantity and quality of competitive enhancements that would be required would depend upon the circumstances of a particular case. This analysis involves factors that are difficult to weigh and offset, such as any merger-related competitive harm for which feasible and effective remedies could not be devised, the amount of post-merger service disruption that would be likely to occur as a result of a particular transaction, and the amount of public benefits that could truly be expected to flow from a particular transaction.[8]

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[7] Certain shippers and shipper groups further request that we impose this relief on railroads that are not applicants or controlled by applicants. However, we lack the authority to impose such conditions on non-applicants.

[8] Some of the railroads argue that we cannot require railroad applicants to offer permanent competitive improvements to offset the risk of temporary service problems. But our merger balancing test already requires us to balance "apples and oranges." While we have never tried to place a dollar weight on every merger benefit and harm, we would note that any

(continued...)

Numerous parties have misconstrued the purpose that would be served by competitive enhancements in the application process. Contrary to the argument of many shippers and shipper groups, our new policy is not predicated on the notion that we need to force future merger applicants to make up for any loss of competition caused by past mergers. These parties argue that, through recent mergers, the rail industry has already become unduly concentrated into the hands of a very small number of Class I carriers, reducing shipper options and increasing railroad market power. But even when there was a larger number of Class I railroads, the U.S. rail industry was already highly "concentrated" as compared to most other industries, in the sense that most shippers were served by a single railroad, and only a small percentage were served by two or more railroads. This structure of the rail industry was created by the marketplace, not by recent mergers or by ICC[9] or STB regulation. Rail investors generally have not believed that the investment in additional rail lines to create two- or three-railroad service to most locations or shippers would prove sufficiently profitable to warrant the investment.

Despite this structure, the returns on investment earned by major railroads have been modest for many years. By 1980, the industry was facing numerous bankruptcies by major carriers. Although mergers and other efficiency-enhancing steps since 1980 have improved that situation, the Class I rail carriers continue to generate very modest returns that are typically below those achieved by the industries they serve. Most Class I railroads have failed to achieve rates of return overall that equal their cost of capital on investment as calculated by the ICC and the Board since 1980. Wall Street rating services such as Moody's Investor Service have reached the same conclusions. *Fortune* magazine has consistently rated returns on assets and on equity for major railroads as worse than the median industry group. As The Burlington Northern and Santa Fe Railway Company (BNSF) notes, in 1999, *Fortune* rated the railroad group as 34th and 37th for return on equity and return on investment, respectively, out of 41 industry groups.

Since 1980 at least, we have consistently imposed merger conditions to preserve two-railroad service where it existed, and we have imposed remedies to preserve competition where the number of carriers serving a shipper has gone from three to two in limited circumstances on a case-by-case basis.[10] The overall result, so far, has been that railroads have continued to face

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[8](...continued)
transitional service problems also delay the arrival of prospective efficiency benefits and thus reduce the present value of these benefits. Moreover, the benefits associated with competitive enhancements arrive with greater assurance and with less delay than do benefits associated with efficiency improvements.

[9] The Interstate Commerce Commission (ICC) is the predecessor agency to the STB.

[10] See, e.g., Union Pacific Corporation, Union Pacific Railroad Company, and Missouri
(continued...)

effective competition, either from other railroads or other modes, that has forced them to pass on the preponderance of the significant efficiency gains they have achieved (through mergers and other means) to the shippers that they serve.[11]

We have not, however, taken these trends, or competition in general, for granted. We have imposed oversight conditions in recent mergers to ensure that mergers do not reduce competition. The records developed in those proceedings after several rounds of oversight have confirmed our predictions in those cases that the transactions would not result in increased market power.

That being said, the prospect of reducing the already small number of major Class I railroads even further, perhaps to the point where only two major railroads remain in the U.S. and Canada, gives us substantial concern. Through the merger process that has taken place over the last 20 years, the number of overall railroad companies has been reduced dramatically, and the size of the remaining carriers has increased correspondingly. Although our new rules and policy statement do not, as the Class I railroads argue, reflect an anti-merger bias,[12] we do plan to take a more skeptical, "show me" attitude toward claims of merger benefits and toward claims that no transitional service problems would occur. More importantly, we need to look down the road and determine whether approving not just the immediate proposal that may be before us, but

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[10](...continued)
Pacific Railroad Company — Control and Merger — Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company [General Oversight], STB Finance Docket No. 32760 (Sub-No. 21), Decision No. 13, slip op. at 14-15 (STB served Dec. 21, 1998). In this regard, we will not adopt the suggestion of The Kansas City Southern Railway Company (KCS) that we should never permit any reduction in the number of railroads serving a particular shipper, regardless of the circumstances. We will continue to evaluate on a case-by-case basis those situations where a shipper would continue to have more than one carrier available to it.

[11] Our Office of Economics, Environmental Analysis, and Administration (OEEAA) has completed several studies over the past 10 years of railroad rates and these, along with other independent analyses performed by disinterested organizations such as the General Accounting Office, have all shown favorable rate trends. The most recent OEEAA study shows that, since 1984, inflation-adjusted railroad rates have decreased more than 45%. As Norfolk Southern (Norfolk Southern Corporation and Norfolk Southern Railway Company) (NS) observes, substantial rate decreases do not occur in the absence of competition.

[12] Citing proposed § 1180.1, BNSF argues that we have proposed to reverse a statutory policy favoring mergers. That section does not support BNSF's argument.

others like it, would ultimately result in a rail industry structure that continues to provide at least the existing level of competitive options for shippers, and continues to make railroads pass on most of the beneficial results of their merger efficiencies to the shipping public.[13]

Our new policy "welcomes private-sector initiatives that enhance the capabilities and the competitiveness of [the] transportation infrastructure," but it disfavors mergers that reduce competitive options for shippers absent substantial overriding public benefits. Thus, we retain in general the traditional balancing test that has always governed our determination of whether mergers are consistent with the public interest under the governing statute, 49 U.S.C. 11323-24. As explained in more detail below, we have taken a fresh look at the factors that go into our traditional public interest balancing test. But we cannot say in advance of a particular proposal exactly what type and what quantity of competitive enhancements would be appropriate. If a merger proposal is in the public interest, we will approve it; if it is not, we will either deny it or impose sufficient conditions to ensure that it is in the public interest.

The Class I railroads contend that by looking for competitive enhancements we incorrectly assume that no future mergers would result in appreciable public benefits, that all future mergers would result in post-merger transitional service disruptions, and that all mergers would cause irremediable competitive harms. They challenge any notion that, without competitive enhancements, future merger proposals would necessarily result in net public harm.

As explained below, however, we have not proposed, and we are not adopting, any such presumption, nor do we wish to prejudge the merits of any future merger proposals. But in light of the service problems that have arisen in recent mergers, and the scale of the transaction that we would be asked to approve in future major rail merger applications, we believe that offering some new or enhanced rail-to-rail competition or other competitive benefits is likely to be necessary to resolve substantial difficulties so as to tip the balance in favor of the public interest. The amount of new or enhanced competition that would be needed to achieve this result would depend on the potential for and likely extent of service problems risked and the degree to which existing competitive alternatives could not be feasibly and effectively preserved.

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[13] The Ohio Rail Development Commission (ORDC) claims that we should give less weight in our balancing test to economic efficiencies, because it claims that railroads would have no incentive to pass along any of these cost savings to "captive" shippers. Although this may be a popular notion, it does not reflect what has happened over the last 20 years. For example, although a large percentage of coal shippers would be deemed "captive," rates charged to coal shippers have fallen even more sharply than have rates to other rail shipper groups during this period.

In formulating our new merger policy and rules, we have been guided by many of the proposals put forth in the record. The new rules, including the new rail merger policy, are set forth in italics below, followed by a narrative discussing the new provisions and any material issues that have arisen or changes that we have made since the NPR. Those existing rules not cited in this document will remain unchanged.

**REVISIONS TO § 1180.1 General policy statement for merger or control of at least two Class I railroads.**

***§ 1180.1(a): General.*** *To meet the needs of the public and the national defense, the Surface Transportation Board (Board) seeks to ensure balanced and sustainable competition in the railroad industry. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private-sector initiatives that enhance the capabilities and the competitiveness of this transportation infrastructure. Although mergers of Class I railroads may advance our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board does not favor consolidations that reduce the transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. Such public benefits include improved service, enhanced competition, and greater economic efficiency. The Board also will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand.*

As explained in the NPR, the prior merger policy statement emphasized assisting railroads in rationalizing the nation's rail system and eliminating excess capacity. In contrast, our new rules recognize that the efficiencies and service improvements likely to be realized from further downsizing of rail route systems are limited. Thus, while the prior policy statement focused on greater economic efficiency and improved service as the most likely and significant public interest benefits, our new policy statement adds enhanced competition as an important public interest benefit. The policy statement also recognizes that, with only a few Class I carriers remaining, a transaction involving two Class I rail carriers would affect the entire transportation system, including highways, waterways, ports, and airports. Any companies resulting from an additional (perhaps final) round of consolidations must be able to compete effectively and deliver necessary services, now and into the future. Finally, as the prior policy provided, any entity seeking control must assume full responsibility for carrying out the controlled carrier's common carrier obligation, and we will exercise our authority to the fullest extent to ensure compliance.

***§ 1180.1(b): Consolidation criteria.*** *The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. 11324 and the rail transportation policy set forth in 49 U.S.C. 10101. In determining*

*the public interest, the Board must consider the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, and fair working conditions for employees. The Board must ensure that any approved transaction would promote a competitive, efficient, and reliable national rail system.*

As noted in the NPR, this portion of our prior policy statement merely recited the statutory criteria. The section we are adopting in its place emphasizes that we must balance various, sometimes conflicting goals in determining the public interest. While we have always used a balancing test, we are changing how we will weigh these goals and are adding new elements to the mix. We are upgrading the importance of competition and recognizing that redundant capacity is no longer a central issue. Claims of improved carrier efficiency will be scrutinized carefully, and we will give greater attention to the potential for transitional service disruptions. Also, we will give greater emphasis to the role of Class II and III carriers and ports in the broader transportation infrastructure.

**Size of carriers subject to these rules.** KCS asserts that for a merger between a large Class I railroad and a smaller Class I railroad such as itself, less stringent requirements should apply.[14] KCS argues that such mergers would not alter the rail transportation environment to the degree that a merger between two large Class I carriers would.

We agree, as a general matter, that a potential transaction involving KCS and another Class I carrier would not necessarily raise the same concerns and risks as other potential mergers between Class I railroads. As explained in our ANPR, the new merger guidelines were prompted largely by the fact that there are now only 6 large carriers remaining in the North American rail industry[15] and there are significant risks associated with further consolidations between any of those carriers. There are, of course, also four other, smaller Class I carriers, but three of them are affiliated with one or another of the larger roads.[16] KCS is the only one of the smaller Class I rail carriers that is not affiliated with one of the six large railroads, and, as KCS points out, a potential merger between it and a Class I carrier would not necessarily have the same impact as

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[14] KCS also suggests a $1 billion threshold (in annual operating revenues) for treatment as a smaller Class I. This proceeding, however, is not an appropriate place for changing the carrier classifications prescribed in 49 CFR 1201, General Instructions.

[15] BNSF, Norfolk Southern Railway Company, Union Pacific Railroad Company, CSX Transportation, Inc., Canadian National Railway Company (CN), and Canadian Pacific Railway Company (CP).

[16] The Grand Trunk Western Railroad Incorporated and the Illinois Central Railroad Company are affiliated with CN, and the Soo Line Railroad Company is affiliated with CP.

other major mergers. Of course, we cannot assess in the abstract the effect of every potential merger proposal involving KCS.

Accordingly, for a merger proposal involving KCS and another Class I railroad, we will waive application of the new rules and apply the rules previously in effect unless we are persuaded otherwise. See 49 CFR §1180.0(b).

**Alliances and joint ventures do not necessarily require our approval.** Some parties argue that we should expand our rail merger review to embrace alliances and joint ventures. However, as we explained in some detail in Canadian National Railway, et al. — Control — Illinois Central Corporation, et al., STB Finance Docket No. 33556 (Decision No. 37), slip op. at 24-31 (STB served May 25, 1999) (CN/IC), under our statute alliances and joint ventures that fall short of either common control or pooling do not require our approval.

***§ 1180.1(c): Public interest considerations.*** *The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits — such as improved service and safety, enhanced competition, and greater economic efficiency — outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms. Although further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. Accordingly, to assure a balance in favor of the public interest, merger applications should include provisions for enhanced competition, and, where both carriers are financially sound, the Board is prepared to use its conditioning authority as necessary under 49 U.S.C. 11324(c) to preserve and/or enhance competition. In addition, when evaluating the public interest, the Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private-sector initiatives, such as joint marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public.*

Our new rule specifically recognizes various new factors in our balancing test, clarifies that certain factors may be weighed differently, and calls for applicants to incorporate proposals for enhanced competition to assure a balance in favor of the public interest.

Even with extensive advance planning, implementing large rail mergers may cause substantial service disruptions that delay or outweigh expected efficiency gains that should flow to the public. These potential harms will be considered in our balancing test. Certain efficiency benefits of mergers may take several years to be realized by the carrier, and in some cases somewhat longer to flow through to the shipping public. Gains that can be experienced only

over time will be given somewhat less weight, using a current value approach. We will also consider the extent to which various claimed merger benefits can be achieved through cooperative agreements among carriers short of a merger. Given the size of the transactions with which we may be faced, and the dangers involved should these transactions fail, we will scrutinize claimed merger benefits very closely.

As explained in more detail below, it is increasingly difficult to remedy certain competitive harms directly and proportionately. For example, we recognize that shippers who are served by a single rail carrier may benefit from having another carrier nearby. They may benefit through geographic competition, through the possibility of constructing (or proposing to construct) a connection to a second carrier, or by transloading freight by truck to a second rail carrier. Although we have imposed conditions specifically addressing concerns raised by the loss of such competitive constraints in prior mergers, this process would become increasingly difficult were the number of independent major railroads to decrease further in a final round of mergers, and were the nearest alternative rail option to be located farther away.

Because of the increased likelihood of transitional service problems and the difficulty of crafting appropriate conditions to mitigate competitive harm, this rule calls for applicants to provide a plan for enhancing competition. This new competition need not be limited to remedying specific competitive or other harms that are threatened by the merger. Competition can be enhanced in many ways. The focus of such a plan could be placed on enhancing intramodal (rail-to-rail) competition, for example, by the granting of trackage rights, the establishment of shared or joint access areas, the removal of "paper" and "steel" barriers, and other techniques that would enhance railroad-to-railroad competition. Unlike some other types of merger benefits that are more uncertain or may take longer to be achieved and even longer to flow through to the public, competitive gains can be realized immediately. Thus, provisions for competitive enhancement will be given substantial weight as merger benefits and are likely to be extremely important to us in determining whether to approve a particular application.

**Responses to railroad arguments about our "presumptions."** The railroads argue that we are overly negative in our assessment of the factors that would need to be balanced in addressing any future proposals, and that we have, in effect, created a series of irrebutable presumptions. That is not the design or intent of these rules, even though we believe, based on our experience with recent rail mergers, that our cause for concern is well founded. In any event, future applicants should make their best case on these issues, but they risk disapproval or imposition of conditions that are not of their choosing if their presentation fails to convince us that the application as presented is in the public interest.

**1. Public benefits may be limited.** Our rules do not unalterably presume, as the Class I railroads argue, that no future rail mergers would produce significant public benefits. Rather, we have observed, and the railroads have largely agreed, that merger-related benefits

formerly obtainable through the elimination of overcapacity in the industry are unlikely to result from future mergers. We recognize, of course, that there are other benefits that can be achieved through mergers in terms of creating single-line service and other efficiencies that can improve rail service and lower rail costs and thus make merging railroads more competitive and more responsive to their customers.

Moreover, as we have explained, in the past many or most of the benefits of such efficiencies have generally been passed along to shippers in the form of reduced rates or improved service. But there is no guarantee that this would continue to be the case in the future, particularly if the number of large railroads were reduced to two or three.

**2. Some competitive harms are increasingly difficult to remedy.** The railroads dispute our assessment that competitive harms that would be increasingly difficult to remedy would be likely to arise from any additional railroad consolidation. The carriers argue that, because future merger proposals would likely be for end-to-end rather than parallel mergers, there would be little loss of direct competition ("2-to-1 points") and thus extensive trackage rights or other remedies comparable to those ordered in Union Pacific/Southern Pacific Merger, 1 S.T.B. 233 (1996) (UP/SP), would not be needed. In addition, the carriers assume that any conditions must be direct and proportionate, that is, they may only provide a specific fix to a specific problem. But we believe the carriers underestimate the difficulties we could face in attempting to remedy, in a direct and proportionate manner, losses of both direct and indirect competition.

As we noted in the NPR, shippers that are served by a single rail carrier may nevertheless benefit from the indirect competition that results from having another carrier nearby. In this regard, they may have the possibility of constructing (or proposing to construct) a connection to a second carrier, or of transloading freight by truck to a second carrier. They also may benefit from the opportunity to negotiate a long-term contract before choosing to locate a new plant along either of two carriers' lines or to adjust production levels at plants already located along those lines. A quick glance at a rail map confirms that the eastern and western railroads do not simply meet end-to-end at Chicago and the Mississippi River crossings; there is a fair degree of overlap. This situation seems to exist with regard to many of the connections of large U.S. and Canadian systems as well. Thus, a merger between any two U.S. Class I rail carriers or between major U.S. and Canadian rail carriers would surely threaten certain shippers with a loss of some indirect competition.

In UP/SP, our condition requiring BNSF trackage rights remedied the competitive harm that would have arisen from the loss, through the merger, of a nearby carrier, because BNSF was permitted to serve new facilities, as well as handle "build-out" and "transload" traffic. Yet these provisions only worked because the traffic base BNSF started from — movements originating or terminating at 2-to-1 points — was sufficient to generate traffic densities that enabled BNSF to

offer a competitive service. With fewer 2-to-1 points likely to arise from any additional rail consolidation, we cannot generalize from BNSF's success and assume that trackage rights could always be structured to remedy future merger-related competitive harms.

Moreover, significant losses in geographic competition could occur even where carriers truly are "end-to-end," because there are many commodities (such as phosphate and soda ash) that have a limited number of sources. Similarly, a merger between BNSF and a Canadian carrier, even if largely end-to-end, could raise potential competitive concerns in western export wheat markets. End-to-end carriers that compete with each other geographically would stand to gain market power if we were to approve their merger without imposing effective conditions, which, as discussed above, could be difficult.

Finally, we are concerned that it might not be possible to remedy losses of direct competition using our traditional trackage rights remedy.[17] First, unlike prior consolidations, shippers or product origination points losing two-railroad competition might not be easily reached and served by other carriers through trackage rights. That is, with a dwindling number of Class I railroads to choose from, there may not be an unaffiliated carrier able to offer an effective replacement service to shippers who would be harmed by a merger.

Second, there might not be a carrier willing to provide replacement competition in a particular merger case. Even in those cases where trackage rights would be the preferred remedy, there must be a carrier both willing and able to provide service. In UP/SP, for example, several carriers in addition to BNSF offered to provide competition to UP/SP,[18] but we felt they lacked the necessary infrastructure and resources to replace the competition that would otherwise have been lost through the merger of UP and SP. BNSF, however, was both willing and able.

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[17] The Committee to Improve American Coal Transportation (IMPACT) argues that trackage rights are an inherently inferior remedy and that we should express a preference for divestiture rather than trackage rights to solve competitive problems. But our experience so far has been that, where there is a carrier that is ready, willing and able to perform them, trackage rights can provide an effective means of remedying what would otherwise be merger-related competitive harm without the destruction of efficiency benefits that can be associated with divestiture.

[18] Union Pacific Corporation and Union Pacific Railroad Company (UP) and Southern Pacific Rail Corporation, Southern Pacific Transportation Company, St. Louis Southwestern Railway Company, SPCSL Corp., and The Denver and Rio Grande Western Railroad Company (SP) (in combination, UP/SP).

In short, in any future consolidation cases, we will strive to remedy every competitive harm that would stem from any proposal that we decide to approve. We anticipate, however, that, to gain our approval, it likely would be necessary for applicants to offer to offset a difficult-to-remedy loss of competition with competitive enhancements.

**3. Transitional service disruptions are likely.** The Class I railroads generally contest our view that service disruptions would be a likely result of major mergers involving the remaining Class I railroads. BNSF and other railroads argue that the two mergers that caused the most serious recent service problems were unique and that those situations are unlikely to be repeated. They point out that SP had a deteriorating infrastructure as a result of years of underinvestment and that CSX[19] and NS divided an existing carrier's assets in an unprecedented manner. The Class I railroads argue that future merger proposals would likely be for relatively simple end-to-end combinations that should not raise significant service issues, and that the railroads have strong financial incentives to avoid these merger-implementation service problems in the future.

But despite the railroads' very strong financial incentives to avoid post-merger service disruptions, despite substantial planning by applicants in conjunction with this agency and the Federal Railroad Administration (FRA), and despite carefully phased and delayed implementation, the CSX/NS/CR[20] transaction resulted in severe service problems that plagued applicants and their customers for a full year or more. Moreover, post-implementation service problems have not been limited to the CSX/NS/CR and UP/SP transactions. The UP/CNW[21] and BN/SF[22] transactions were also accompanied by service disruptions, although they were less severe in magnitude than those in UP/SP and CSX/NS/CR. Thus, it is natural for the Board to be concerned about future mergers in this connection, and we must anticipate that, because of their

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[19] CSX Corporation and CSX Transportation, Inc. (CSX).

[20] CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388 (Decision No. 89) (CSX/NS/CR) (STB served Jul. 23, 1998), aff'd, Erie-Niagara Rail Steering Committee, et al v. STB, 247 F.3d 437 (2d Cir. 2001) (Erie-Niagara).

[21] Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company — Control — Chicago and North Western Transportation Company and Chicago and North Western Railway Company, Finance Docket No. 32133 (ICC served Mar. 7, 1995) (UP/CNW).

[22] See Burlington Northern Et Al. — Merger — Santa Fe Pacific Et Al., 10 I.C.C.2d 661 (1995) (BN/SF).

inherent complexity and scale, future mergers involving the remaining major carriers entail a risk of significant service disruptions that could be nationwide in scope and would not be easily addressed given that even fewer major carriers than today would be available to assist in resolving the disruptions.

**Benefits obtainable by other means.** BNSF argues that merger applicants should not have to explain whether claimed merger benefits can be achieved through other means, such as joint ventures or alliances. BNSF argues that it would be irrational for two railroads to propose an end-to-end merger unless they believed that the merger would generate cost savings and service improvements that they could not gain by other means. In considering this argument, it is important to keep in mind that merger transactions are sometimes pursued for reasons other than just cost savings and service improvements. In addition, we recognize that consolidations may permit applicants to gain substantial benefits that are not otherwise achievable, and that the finality of a consolidation can result in long-term investments that would not otherwise be made. But this does not mean that all of the claimed benefits require a merger for their accomplishment, nor does it address shipper concerns that a carrier might seek to gain enhanced market power through a merger, while claiming that this harm would be offset by efficiencies that could actually be achieved by means short of merger. We need to have a full awareness of which of the claimed benefits are obtainable only through a merger so that we can fairly weigh them against potential harms. Accordingly, we believe that it is appropriate for us to require applicants to address the question of whether the particular merger benefits upon which they are relying could be achieved by means short of merger.

**Financially unsound applicants.** Implicit in our policy is the notion that the standards should be applied less stringently to merger proposals involving financially unsound applicants. A mere failure to achieve revenue adequacy, however, is not our yardstick here. Instead, we are referring to carriers in such poor financial shape that a commitment by a financially sound carrier to invest in maintaining and upgrading deteriorating rail infrastructure is needed and constitutes a significant public benefit in its own right, as was the case in UP/SP.

***§ 1180.1(c)(1): Potential benefits.*** *By eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density, mergers can generate important public benefits such as improved service, more competition, and greater economic efficiency. A merger can strengthen a carrier's finances and operations. To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies would be shared with shippers and consumers. Both the public and the consolidated carrier can benefit if the carrier is able to increase its marketing opportunities and provide better service. A merger transaction can also improve existing competition or provide new competitive opportunities, and such enhanced competition will be given substantial weight in our analysis. Applicants shall make a good faith effort to calculate the net public benefits their proposed merger would generate, and the Board will*

*carefully evaluate such evidence. To ensure that applicants have no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner. In this regard, the Board recognizes, however, that applicants require the flexibility to adapt to changing marketplace or other circumstances and that it is inevitable that an approved merger may not necessarily be implemented in precisely the manner anticipated in the application. Applicants will be held accountable, however, if they do not act reasonably in light of changing circumstances to achieve promised merger benefits.*

Our new policy emphasizes the public benefits flowing from enhanced competition, while strongly cautioning applicants not to exaggerate their benefit projections. To ensure that applicants are careful in their presentation of public benefits, we will require them to suggest additional measures that we could take if those benefits are not realized in a timely manner. We are mindful that many of the benefits claimed by applicants in recent mergers have been delayed by transitional service problems, frustrating both the Board and the shipping community. We are also mindful that the potential efficiency benefits of future large rail mergers may be more limited than in the past. While we believe that overall post-merger service is improving and the benefits initially promised by past applicants will eventually be achieved, we will take particular care to scrutinize future claims of merger benefits and associated time frames to determine whether the applicants' projections are well-documented and reasonable.

**Benefits not realized.** Some shippers argue that successful applicant railroads should be held accountable for achieving the public benefits that they project in their merger applications. PPL Utilities and PPL Montana (PPL) argue that applicants too often have over-promised and under-delivered, noting that the applicants in the CSX/NS/CR acquisition predicted that they would remove 1 million trucks a year from the highways, but the carriers have failed to meet that goal.

The railroads argue that they should not be held accountable for circumstances that were not reasonably foreseeable at the time of the merger application. UP and NS argue that we should require of applicants only reasonable efforts to carry out an approved transaction in a manner that achieves the benefits projected. The Association of American Railroads (AAR) argues that no other industry is required to provide financial guarantees that good faith estimates of merger benefits would actually be realized.

We believe that applicants should identify additional measures for use in case anticipated public benefits should fail to materialize in a timely manner. We ask for this information not so we can punish carriers for any failures associated with a merger that we approve, but to provide applicants with the proper incentives to identify more cautiously and, if approved, to secure more certainly, the public benefits that they project for their merger proposals. We are acutely aware that, as we approach the "end-game," the price for any failure would be high.

The "additional measures" we are calling for are not designed to indemnify specific interests for all claimed benefits that do not come to fruition. Rather, they are a regulatory mechanism designed both to limit exaggeration and to address problems if and when they might arise. Thus, while these measures should be sufficient to ensure that applicants come to us with reasonable projections of expected public benefits, they should not be so potentially burdensome as to unduly harm a merged carrier. The need for such incentives is particularly important if, as we believe, future merger applications are likely to present closer calls in which any individual claim for a particular merger-related benefit or harm might be dispositive.

In this regard, we believe that the increased emphasis these rules place on service assurance plans should address temporary service problems associated with merger integration, and we already have procedures in place for expedited service relief in the event that service problems prove particularly severe. Further, the proposals to enhance competition that we are requesting of applicants are based in part on the likelihood of transitional service problems. Therefore, we would resort to additional measures when the carriers have failed to meet public benefit expectations, and not simply when those benefits have been temporarily delayed by unforeseen operational problems.

We emphasize that merger impact analyses are not intended to guarantee future results, without any consideration of changing economic conditions and other circumstances beyond the applicants' control. It is not our objective to hold railroads to every detail of an operating plan in implementing an approved transaction, nor would we impose after-the-fact remedies lightly. But applicants would be held responsible for any unreasonable failure to achieve promised benefits. And if things do not work out as planned, either from a competitive or a service standpoint, for whatever reason, the merged carriers should be prepared to try different approaches. Accordingly, we would look with more favor on applications that provide back-up or contingency plans when we weigh projected benefits against harms. Such plans could increase the likelihood, and hence give us greater assurance, that a particular merger proposal would be in the public interest.

***§ 1180.1(c)(2): Potential harm.*** *The Board recognizes that consolidation can impose costs as well as benefits. It can reduce competition both directly and indirectly in particular markets, including product markets and geographic markets. Consolidation can also threaten essential services and the reliability of the rail network. In analyzing these impacts we must consider, but are not limited by, the policies embodied in the antitrust laws.*

***(i) Reduction of competition.*** *Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive shippers of effective options. Intramodal competition can be reduced when two carriers serving the same origins or destinations merge. Competition arising from shippers' build-out, transloading, plant siting, and production shifting choices can be eliminated or reduced when two railroads serving overlapping areas merge. Competition in*

*product and geographic markets can also be eliminated or reduced by mergers, including end-to-end mergers. Any railroad combination entails a risk that the merged carrier would acquire and exploit increased market power. Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive and market options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.*

***(ii) Harm to essential services.*** *The Board must ensure that essential freight, passenger, and commuter rail services are preserved wherever feasible. An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available. The Board's focus is on the ability of the nation's transportation infrastructure to continue to provide and support essential services. Mergers should strengthen, not undermine, the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally. The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services.*

***(iii) Transitional service problems.*** *Experience shows that significant service problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid those disruptions. Because service disruptions harm the public, the Board, in its determination of the public interest, will weigh the likelihood of transitional service problems. In addition, under paragraph (h) of this section, the Board will require applicants to provide a detailed service assurance plan. Applicants also should explain how they would cooperate with other carriers in overcoming serious service disruptions on their lines during the transitional period and afterwards.*

***(iv) Enhanced competition.*** *To offset harms that would not otherwise be mitigated, applicants should explain how the transaction and conditions they propose would enhance competition.*

We are highlighting a new category of possible merger harm — transitional service problems — that we will scrutinize carefully. Cooperation and communication between independent railroads is vitally important during emergencies. Applicants should explain how they would cooperate with other carriers in overcoming serious service disruptions on their lines during the transitional period and afterwards. Any further decrease in the number of major independent railroads from which to obtain assistance would make inter-carrier cooperation increasingly important. Moreover, with regard to the "harm to essential services" criterion, we have now broadened our prior focus on the rail network to incorporate the entire transportation infrastructure, and have placed increased emphasis on the role of smaller carriers and ports as vital links in the transportation system.

**Preserving major gateways.** In the NPR, we proposed that, because most inefficient gateways now either have been closed or move only minimal traffic, major existing gateways should be kept open in future mergers. Preserving existing gateways is broadly supported by The National Industrial Transportation League (NITL), American Short Line Railroad Association (ASLRRA), United States Department of Agriculture (USDA), and others.[23] We will require applicants to present an effective plan to keep open major existing gateways, and will impose conditions on any transaction that we approve to ensure that result.

Numerous parties, including NITL and American Chemistry Council (ACC), stress that gateways must be kept open not just physically but economically. Although we agree, we will not go so far as to resurrect the long-discredited commercial closing doctrine, under which any rate differential was deemed to close a gateway. As the ICC explained in Traffic Protective Conditions, 366 I.C.C. 112 (1982), such a rate equalization policy destroys the ability of the merged carrier to reduce rates to reflect its new efficiencies, inhibits competition, and thereby harms both shippers and carriers. At this juncture, we do not believe it would be appropriate to impose any of the several across-the-board rules that have been suggested by various parties for determining when a gateway would be deemed economically closed. Rather, we believe such issues are best addressed on a case-by-case basis. Various parties may offer different ways to achieve gateway protection, and we should give them flexibility to devise effective means depending on the situation. During the oversight process, if we should find that traffic is not moving as it had in the past through a particular gateway that was to be preserved, we can investigate the reasons for the change and weigh appropriate remedies.

During a merger proceeding, parties may identify gateways other than those initially identified by applicants that these parties believe also require specific protection. We can then determine, if we decide to approve the application, whether conditions are necessary to protect a particular gateway from closure. A similar situation arose in CN/IC, Decision No. 37, slip op. at 37, where we imposed a condition requiring applicants to keep the Chicago gateway open and competitive for North Dakota grain movements.

As NITL has suggested, we might permit closure of an existing gateway under certain circumstances. For example, closure might be appropriate if a gateway is shown to be

[23] NITL contends that the term "major gateway" is confusing and should be replaced by the word "interchange." We believe that NITL's proposed change is too broad and imprecise. In our view, the term "major gateway" best describes where the parties and record in any future major merger proceeding should focus.

unnecessary to preserve competitive routing options or if maintenance of a particular gateway is shown to undermine economies of density.[24]

**Preserving bottleneck rate relief.** We will also impose whatever conditions are necessary to preserve pre-merger opportunities for separately challengeable segment rates to be used in conjunction with contract rates in bottleneck situations.[25] It is well established that the ability to challenge a bottleneck rate can provide shippers with leverage. But we cannot overrule our bottleneck decision so as to permit separate rate challenges to all segments of through or joint rates, as some parties have requested. It is now well settled that, absent a transportation contract to a junction, our statutory scheme does not permit shippers to challenge segments of joint or through rates. Moreover, these parties have not shown that this relief has the requisite nexus to mergers.

**Preserving essential services.** UP asserts that we should limit the essential services designation to freight service, while some of the passenger authorities argue that every existing passenger service should be considered an essential service. Although we agree that it may not be possible to preserve every existing passenger service, we will give careful consideration to passenger service issues in our merger analysis.

Some of the passenger authorities have argued that applicants must be strictly held to the representations in their Service Assurance Plans, and that the passenger authorities should receive damages when those plans are not followed. Amtrak and the Class I railroads argue, and we agree, that applicants whose merger proposals have been approved must have some flexibility to alter those plans to meet changed circumstances.

Even though we will impose conditions where appropriate to protect passenger railroads from merger-related harm, we will not impose remedies that are inconsistent with passenger service contracts, and we will not require applicants to subsidize passenger service. As we have noted in prior merger decisions, most contracts with passenger authorities already include incentives and penalties for service performance. There is no reason here to attempt to change the fundamental contractual relationship between freight and passenger carriers. Adherence to

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[24] Although NITL would require applicants to show that maintenance of the gateway would be "patently inefficient," we believe this would be an unduly burdensome standard.

[25] See Central Power & Light Co. v. Southern Pac. Transp. Co., 1 S.T.B. 1059 (1996), clarified, 2 S.T.B. 235 (1997), aff'd sub nom. MidAmerican Energy Co. v. STB, 169 F.3d 1099 (8th Cir. 1999), cert. denied sub nom. Western Coal Traffic League v. STB, 528 U.S. 950 (1999); Union Pac. R.R. v. STB, 202 F.3d 337 (D.C. Cir. 2000) (bottleneck decision).

these contractual terms is, in most instances, the best way to resolve the sometimes conflicting needs of these parties.

**Shortline and regional railroads and ports.** The record indicates that there are now over 500 regional and shortline rail carriers, and that these account for 9% of rail revenues and 16% of rail carloadings. As USDA notes, these smaller carriers are crucial to the grain gathering process. Indeed, they are important in the overall funneling of rail freight to and from the Class I carriers. Because of the vital role of Class II and Class III railroads and ports in creating and maintaining a strong national rail transportation system, their interests are a key component of merger review.

We will therefore require applicants to detail a proposed transaction's projected impact on regional and shortline carriers and ports. Under our new rule, applicants must address the anticipated effects of a proposed merger on regional and shortline railroads, identify any benefits that those smaller railroads and their customers would realize as a result of the proposed transaction, and develop suggested remedies for any anticipated harms to the public interest by virtue of a merger's adverse impacts on regional and shortline railroads and ports.

To monitor the potential adverse impacts of any approved merger on smaller railroads, we will also require applicants to address regional and shortline railroad issues in the post-merger oversight process. After the applicants' annual oversight report is filed, Class II and Class III railroads would be given the opportunity to respond. We would then issue a decision addressing any harms to regional and shortline carriers and, if necessary, imposing further conditions to ameliorate or redress those harms.

We can address and, if necessary, remedy competitive and other problems that Class II and III carriers may experience that stem from an approved rail merger on a case-by-case basis. For example, in CSX/NS/CR we imposed a condition to preclude contractual restrictions on shortline access from being expanded as a result of the transaction, and we will continue to impose conditions of that nature where appropriate.

We continue to encourage private-sector solutions to these issues. For example, the 1998 Rail Industry Agreement (RIA) between AAR and ASLRRA addresses certain major areas that concern the regional and shortline railroads. AAR indicates that it has worked extensively with the ASLRRA railroads to implement the RIA and has established a special mediation review process for any shortline railroad that believes it has been harmed by an action of a Class I railroad that is inconsistent with the terms of the RIA. The ASLRRA claims that the RIA is not working as effectively as the small railroads had hoped. ASLRRA asserts that the results have been disappointingly limited and that only a handful of waivers have been granted. While the Board applauds this private sector initiative to deal with competitive issues between large and small railroads, the jury is still out on RIA's success.

**Financial issues.** Numerous shippers and shipper organizations have voiced concern that our proposed rules did not effectively address a potential merger harm related to "acquisition premiums." This term is used to refer to the difference between the value of a company based upon either the book value or the price of a single share of stock before a tender offer and the price that the buyer actually has to pay to obtain control. If a proposed transaction raises financial issues that relate to the merged carrier's ability to meet its fixed charges, then of course we will examine that issue in determining the public interest, just as we did in CSX/NS/CR. 49 U.S.C. 11324(b)(3).

Many commenters have suggested that we should adopt a policy of valuing all properties obtained through a merger based upon the predecessor book values or the stock price of the entity before the merger. We continue to believe, however, that there is no sound economic justification for that approach. Because our reasons for not adopting such an approach have already been set forth in detail in CSX/NS/CR and other cases,[26] we need not detail those reasons here.[27] Suffice it to say that we do not believe that railroads have any regulatory incentive to overpay for rail properties. But if it is shown that the applicants in a case would pay so much for a property that their financial viability could be undermined, we would likely deny that application. As explained below, we have modified our approach to voting trusts to ensure that their use would not jeopardize a carrier's financial viability before we have the opportunity to make a full assessment of the financial impact upon the applicants.

**Voting trusts.** We have added a new rule, in § 1180.4(b)(4)(iv), addressing the use of voting trusts. The Board, like the ICC before it, has permitted the use of voting trusts during the pendency of control applications, so long as the trust would not result in unlawful control. 49 CFR 1013. To facilitate this process, the Secretary of the Board has issued informal, non-binding, staff letters giving an opinion as to whether use of the voting trust would result in unauthorized control. However, we have decided to provide for a more formal and open process for applicants in major rail consolidations, requiring them to demonstrate in a public filing that their contemplated use of a trust would not result in unlawful control and would be consistent with the public interest. (The rules governing the use of voting trusts in all other control transactions that come before us would remain unchanged.)

CN questions our authority to rule on, or prevent the use of, a voting trust, but that power is inherent in our statutory authority over rail mergers. Under 49 U.S.C. 11323, we have plenary

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[26] See, e.g., Railroad Revenue Adequacy - 1988 Determination, 6 I.C.C.2d 933 (1990), aff'd sub nom. Association of Am. R.R. v. ICC, 978 F.2d 737 (D.C. Cir. 1993).

[27] Moreover, our handling of this issue in CSX/NS/CR was recently upheld by the U.S. Court of Appeals for the Second Circuit. See Erie-Niagara, supra note 16, 247 F.3d at 442-43.

authority over the consolidation, merger, or common control of railroads. We also have a particular obligation under 49 U.S.C. 11324(b)(3) to consider the total fixed charges resulting from a transaction. Thus, we are responsible for ascertaining whether a proposed transaction would undermine the financial integrity of the applicant carriers. If prospective applicants make large tender offers for controlling stock interests in other rail carriers, they risk having to sell these assets at a greatly reduced price if we do not approve the control application or if they choose not to consummate it. Therefore, we believe that, with only a limited number of major railroads remaining, we must take a much more cautious approach to future voting trusts in order to preserve our ability to carry out our statutory responsibilities.

CSX has expressed concern that this new rule, under which a voting trust would only be permitted where we find its use to be in the public interest, would give an enormous advantage to non-railroad entities in an attempted hostile takeover of a railroad system. CSX also argues that, to the extent that our public interest inquiry is based on an assessment of financial fitness, it would require detailed financial and other information that is typically not fully available to the parties at the time they file their notice of intent with the Board, and typically has not been submitted until several months later in their control application.

Although we understand CSX's concerns, we believe that it has become necessary for us to determine that a voting trust would be consistent with the public interest before permitting one to be used. There was no need to undertake a preliminary financial fitness assessment when unsuccessful applicants could largely be expected to be made whole through the divestiture process. But it is precisely the divestiture process that now concerns us. When the ICC denied the application in SF/SP,[28] at least two Class I railroads — the Denver and Rio Grand Western Railroad and KCS — were actively involved in bidding for SP when it had to be divested from the voting trust into which its stock had been placed pending the application. In contrast, today there would likely be cases where there would be *no* remaining railroad bidders acceptable to us to buy the shares held in a voting trust if we were to deny a major control transaction or impose conditions that the applicants choose not to accept. Bidding limited to nonrailroad entities poses the risk of serious financial harm to applicants and, more importantly, poses risks to their customers as well. Therefore, to gain approval for the use of a voting trust, applicants would have to demonstrate either that any harm to the public interest associated with the divestiture process would be relatively small or that some countervailing public benefit would be associated with their proposed use of a voting trust that would outweigh this risk.[29] (For example, the

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[28] Santa Fe Southern Pacific Corp. — Control — SPT Co., 2 I.C.C.2d 709 (1986), 3 I.C.C.2d 926 (1987) (SF/SP).

[29] This approach is consistent with the view expressed by CSX at oral argument that,

(continued...)

pendency of a hostile takeover bid by a non-railroad entity might make the use of a voting trust more appropriate.)

Finally, we agree with CSX that requests to use a voting trust need not be submitted with the prefiling notice, and we have revised the rule accordingly. Nonetheless, prospective applicants are forewarned that use of a voting trust is a privilege, not a right, and that they may not employ a voting trust until we have authorized its use.

**Lumber issues.** The Lumber Fair Trade Group, representing wholesale distributors of forest products, raises another concern. It argues that, when buying lumber produced in Canada, its members are forced to pay unsubstantiated and overstated freight costs as part of the purchase price. It is concerned that this practice, which it refers to as the "phantom freight" practice, is not subject to the U.S. antitrust laws. Accordingly, it argues that approval of any transaction that would result in foreign control of U.S. property must be conditioned upon a requirement of full and complete retention of records within the jurisdiction of the Board and the U.S. courts. It is unclear exactly to what records it is referring, but regardless of the nationality of the owner, railroads operating in the U.S. remain subject to our full regulatory scrutiny and record-keeping requirements.

***§ 1180.1(d): Conditions.*** *The Board has broad authority under 49 U.S.C. 11324(c) to impose conditions on consolidations, including requiring divestiture of parallel tracks or the granting of trackage rights and access to other facilities. The Board will condition the approval of Class I combinations to mitigate or offset harm to the public interest, and will carefully consider conditions proposed by applicants in this regard. The Board may impose conditions that are operationally feasible and produce net public benefits, but will not impose conditions that undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier. Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition. The Board anticipates that mergers of Class I carriers would likely create some anticompetitive effects that would be difficult to mitigate through appropriate conditions, and that transitional service disruptions might temporarily negate any shipper benefits. To offset such potential harms and improve the prospect that their proposal would be found to be in the public interest, applicants should propose conditions that would not simply preserve but also enhance competition. The Board seeks to enhance competition in ways that strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).*

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[29](...continued)
while voting trusts can serve some public purpose, they should not be used routinely, but rather should be available only for those rare occasions when their use would be beneficial.

Instead of focusing narrowly on harm to competition and essential services, our new rule reflects a willingness to use our conditioning power to mitigate or offset all types of merger-related harms to the public interest. It also reflects the recent statutory clarification that we have the authority to require divestiture of parallel tracks or grant trackage rights or other access rights under terms that ensure that effective competition is maintained. This section focuses on imposing sufficient conditions to ensure that a transaction is truly in the public interest.

**Conditions are still primarily remedial.** Our primary focus in imposing conditions — including competitive conditions — should and will continue to be remedial. Contrary to arguments raised by numerous shippers and shipper groups, conditions should not be sought to fix competitive and other longstanding problems that have no nexus to the merger at hand. The fact that we are asking merger applicants to offer new competitive benefits as part of their application does not entitle every party to a merger proceeding to claim that such benefits must be granted on its behalf to fix an existing problem or to enhance its pre-merger competitive situation. Rather, the focus of interested parties should continue to be on remedying competitive and other harm that would likely be experienced by that party as a result of the merger proposal under review. Imposing remedial conditions as appropriate will continue to be our top priority where we decide that a proposal might be in the public interest. Given this focus, the fact that we are also asking applicants to offer competitive enhancements — as applicants did in both UP/SP and in CSX/NS/CR — should not unduly complicate or delay our review of merger proposals as some have argued.

Numerous shippers and shipper groups have questioned our asking applicants to come forward with competitive enhancements tailored to their particular proposal rather than our dictating at the outset a more pervasive and uniform approach. We continue to believe that the method we have proposed is far preferable. First of all, it is consistent with the Board's focus on market-based and private-sector initiatives. Secondly, our more flexible approach encourages innovation and initiatives tailored to a particular transaction. Thirdly, with respect to the more pervasive and uniform approach that has been proposed, we recognize that carriers need to be able to engage in some degree of differential pricing and that opening up every one of their solely served shippers to competition from other rail carriers could dramatically affect not just the merged carrier's bottom line but also the shape of the rail system for the future. And we also recognize that granting shippers direct access to other rail carriers could, at least in some cases, complicate merger implementation by creating additional congestion. For these reasons, we are asking railroad applicants to present a proposal that they believe they can both afford and implement operationally.

**Conditions are not appropriate for carriers that are not applicants or controlled by applicants.** As previously noted, NITL and others argue that we should use our broad conditioning power to force all successful merger applicants to grant broad competitive concessions. They further argue that we should use our general regulatory authority to create a

level playing field by requiring the rest of the rail industry to grant similar concessions. These arguments are misplaced. Our focus here is on ensuring that any mergers that are approved are in the public interest, not on imposing a new scheme of regulation upon the railroad industry through the back door of merger approval.

If applicants in a future rail merger proceeding did not believe that they could prosper with the conditions that we ultimately impose, they would have the option of not proceeding with the approved transaction.[30] Non-applicant railroads would not have a similar option not to proceed. Moreover, imposing such conditions on carriers that are not applicants or controlled by applicants is not within our merger conditioning authority, which gives us only the power to "impose conditions governing the transaction." Thus, the request goes well beyond the scope of this proceeding.

***§ 1180.1(e): Employee protection.*** *The Board is required to provide a fair arrangement for the protection of the rail employees of applicants who are affected by a consolidation. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to ensure fair and equitable treatment of all affected employees. Absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement.*

This rule reflects our continued emphasis on negotiation between the unions and railroad management, without direct Board involvement, to resolve merger implementation issues.

Various unions have argued that we should eliminate altogether the power of arbitrators or the Board to override collective bargaining agreements (CBAs) when that is necessary to carry out a consolidation transaction approved by the agency. In contrast, the National Railway Labor Conference (NRLC) argued on behalf of the railroads that our proposed rule already goes too far in that direction by indicating that "we will look with extreme disfavor on overrides of CBAs except to the very limited extent necessary to carry out an approved transaction." However, the parties' pleadings — staking out starkly contrasting positions — have now been largely

[30] As explained above, we are modifying our approach to voting trusts to ensure that applicants preserve that option.

superseded by an historic settlement agreement signed by most of the Class I railroads and by the unions representing most rail employees.[31]

As we encouraged this outcome, we are extremely pleased that these parties have reached agreement on the highly sensitive issue of CBA overrides. Both sides have gained through this process. The railroads have preserved their ability to implement mergers promptly by reaching agreement on issues such as seniority lists and the scope of work. At the same time, the employees have been permitted to select seniority arrangements and CBAs that they believe are most favorable to them.

To the extent that there is still any live issue, we continue to believe that our proposed rule properly implements our statutory mandate. Our new rules reaffirm that we support negotiated agreements wherever possible, that we respect the sanctity of CBAs, and that we would look with disfavor on overrides. As noted in our landmark Carmen III decision,[32] override issues are not to be taken lightly, and the necessity standard is not an invitation for the railroads to make whatever changes in CBAs they find convenient.

**Moving.** RLD seeks elimination of the requirement of New York Dock that employees must fully exercise their seniority to take the highest paying job available — even if that requires a change in residence — in order to be eligible for compensation for reduced wages. RLD argues that this change is necessary because future mergers would likely be transcontinental, presumably requiring employees to move longer distances, and because many employees have working spouses who cannot easily relocate. RLD argues that requiring employees to move has caused hardships that are not fully compensated by New York Dock.[33] The railroads counter

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[31] The railroad parties are NS, CSX, UP, BNSF, CP, and KCS. The unions are Brotherhood of Locomotive Engineers (BLE), Brotherhood of Maintenance of Way Employes (BMWE), International Association of Machinists and Aerospace Workers (IAM), Brotherhood of Railroad Signalmen (BRS), Transportation•Communications International Union (TCIU), the Sheet Metal Workers International Association, and the Transport Workers Union of America. United Transportation Union (UTU) negotiated a separate, similar agreement with the Class I railroads, dated February 11, 2000, that it indicates satisfies its concerns in this area.

[32] CSX Corporation — Control — Chessie System, Inc. and Seaboard Coast Line Industries, Inc. (Arbitration Review), Finance Docket No. 28905 (Sub-No. 22) (STB served Sept. 25, 1998) (Carmen III).

[33] The record includes specific stories of named employees, accompanied by statements from those individuals, which provide details of hardships they have had to encounter due to moving requirements.

that, even in the earliest labor protection cases, employees were forced to move a thousand miles or more, which was a great distance at the time.

Under 49 U.S.C. 11326(a), the Board is mandated to require the applicant railroad to provide a minimum level of employee protection before we can authorize a transaction. In the merger area that minimum level comprises the conditions outlined in New York Dock. Section 11326(a), however, allows the Board the option of mandating that the applicant provide employee protection above that minimum level. We appreciate, therefore, RLD's concerns and can foresee the broader potential for dislocation and hardship for rail employees as a result of a transcontinental merger. While, at this time, we believe that this and similar matters should continue to be negotiated between the railroads and the various labor organizations,[34] we are available, should it prove necessary, to reopen New York Dock, on a limited basis, to address the issue of moving in the future.

***§ 1180.1(f): Environment and safety.*** *(1) The National Environmental Policy Act, 42 U.S.C. 4321 et seq. (NEPA), requires the Board to take environmental considerations into account in railroad consolidation cases. To meet its responsibilities under NEPA and related environmental laws, the Board must consider significant potential beneficial and adverse environmental impacts in deciding whether to approve a transaction as proposed, deny the proposal, or approve it with conditions, including appropriate environmental mitigation conditions addressing concerns raised by the parties, including federal, state, and local government entities. The Board's Section of Environmental Analysis (SEA) ensures that the agency meets its responsibilities under NEPA and the implementing regulations at 49 CFR 1105 by providing the Board with an independent environmental review of merger proposals. In preparing the necessary environmental documentation, SEA focuses on the potential environmental impacts resulting from merger-related changes in activity levels on existing rail lines and rail facilities. The Board generally will mitigate only those impacts that would result directly from an approved transaction, and will not require mitigation for existing conditions and existing railroad operations.*

*(2) During the environmental review process, railroad applicants have negotiated agreements with affected communities, including groups of communities and other entities such as state and local agencies. The Board encourages voluntary agreements of this nature because they can be extremely helpful and effective in addressing specific local and regional environmental and safety concerns, including the sharing of costs associated with mitigating merger-related environmental impacts. Generally, these privately negotiated solutions between an applicant railroad and some or all of the communities along particular rail corridors or other*

[34] We are denying RLD's request for employees to be provided with their test period averages (on which benefits would be computed) on demand. We believe that issue should be resolved through negotiation and the collective bargaining process.

*appropriate entities are more effective, and in some cases more far-reaching, than any environmental mitigation options the Board could impose unilaterally. Therefore, when such agreements are submitted to it, the Board generally will impose these negotiated agreements as conditions to approved mergers, and these agreements generally will substitute for specific local and site-specific environmental mitigation for a community that otherwise would be imposed. Moreover, to encourage and give effect to negotiated solutions whenever possible, the opportunity to negotiate agreements will remain available throughout the oversight process to replace local and site-specific environmental mitigation imposed by the agency. The Board will require compliance with the terms of all negotiated agreements submitted to it during oversight by imposing appropriate environmental conditions to replace the local and site-specific mitigation previously imposed.*

*(3) Applicants will be required to work with the Federal Railroad Administration, on a case-by-case basis, to formulate Safety Integration Plans (SIPs) to ensure that safe operations are maintained throughout the merger implementation process. As part of the environmental review process, applicants will be required to submit*

*(i) a SIP and*

*(ii) evidence about potentially blocked grade crossings as a result of merger-related traffic increases or operational changes.*

We continue to believe that there is no need to amend our environmental rules at 49 CFR 1105, which are not specific to mergers.[35] Given the importance of addressing merger-related environmental concerns, however, we will add this new final rule outlining our intended approach to the environmental review required by NEPA and related environmental laws for major merger transactions.

Based on the comments,[36] we have added language clarifying that our general practice is to focus on the potential environmental impacts resulting from merger-related changes to lines, facilities, and operations, and not to require mitigation for existing conditions and existing railroad operations. In addition, our final rule codifies current practice by adding language explaining that, to give effect to negotiated solutions wherever possible, we will generally

[35] As we explained in the NPR, our environmental rules implementing NEPA are broadly designed and can be applied to any rail-related actions that come before us, including rail mergers. They give us the flexibility to respond to all types of issues and concerns raised by the public, and to tailor the environmental documentation and analysis to the particular case.

[36] See the comments of AAR, KCS, and NS.

require compliance with the terms of all negotiated agreements submitted to us during our formal oversight period in lieu of the local and site-specific mitigation that they would replace.[37]

Certain commenters[38] suggest that we be available to resolve disputes where the parties are unable to reach negotiated agreements. But that would defeat the purpose of negotiated agreements, which is to arrive at voluntary, mutually satisfactory arrangements between the railroads and the affected parties. Thus, it would be inappropriate for us to intervene formally in the parties' negotiations, or to impose restrictions on the content or extent of the negotiations. If the parties are unable to reach agreement, then we will impose whatever local and site-specific environmental mitigation we find is appropriate in the course of our environmental review process.

Our proposal to require applicants to work with FRA, on a case-by-case basis, to formulate SIPs[39] ensuring that safe operations would be maintained throughout the merger

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[37] Our practice of encouraging negotiated resolution of environmental issues to the widest extent possible met with broad support from commenters representing railroad interests (AAR, CSX, and NS), government interests (ORDC) and community interests (Port of Pascagoula, City of Mankato). AAR, however, suggests deleting the reference to negotiated agreements with "groups of neighborhood communities" in our proposed rule. We agree with AAR that it is doubtful that such groups could or would enter into agreements. Therefore, while railroads may negotiate such agreements with any interested parties, as appropriate, our final rule specifically refers only to "affected communities," "groups of communities," and "other entities such as state or local agencies."

[38] NS, KCS, ORDC, Port of Pascagoula, City of Owatanna, and City of Mankato.

[39] As noted in the NPR, we have instituted a joint rulemaking with FRA in which the two agencies, working together, have proposed regulations to ensure adequate and coordinated consideration of safety integration issues in railroad merger cases. See Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisitions of Control and Start Up Operations; and Procedures for Surface Transportation Board Consideration of Safety Integration Plans In Cases Involving Railroad Consolidations, Mergers and Acquisitions of Control, STB Ex Parte No. 574, FRA Docket No. SIP-1, Notice No. 1 (Joint Notice of Proposed Rulemaking (STB served Dec. 24, 1998, and published at 63 FR 72225 on Dec. 31, 1998)) (SIPS Rulemaking). We have already solicited and received comments in that proceeding, and a joint hearing has been held by the two agencies. Until a final decision in the joint rulemaking is issued, we will continue to address these safety integration issues on a case-by-case basis.

implementation process received wide public support and no opposition.[40] Accordingly, the language of the proposed rule relating to SIPs is essentially unchanged.

In addition to a SIP, applicants will be required to submit evidence about potentially blocked grade crossings as a result of anticipated merger-related traffic increases. The potential for blocked railroad crossings resulting from increased traffic due to mergers has become an increasing concern to communities. Therefore, for major transactions there is good reason to require applicants to address in their initial environmental information what measures they plan to take to avoid blocking grade crossings due to merger-related changes in operations (including increased yard activity), or merger-related increases in rail traffic. Therefore, we have retained this requirement in our final rules.[41]

BNSF and NS request that the environmental review process in major transactions be completed within 1 year from the date of applicants' prefiling notice. Although it is important to complete our environmental review as expeditiously as possible, it would be inappropriate and perhaps impossible to establish and adhere to uniform time frames for the issuance of the necessary environmental documentation. The complexity and nature of the environmental issues that need to be analyzed in individual cases can vary, and at times significant issues surface during the environmental review process that were not anticipated at the beginning of the process, but nevertheless need to be addressed in completing the environmental analysis that NEPA requires. The 16-month statutory time limit for our consideration of railroad merger proposals — and our consistent practice of issuing our final environmental document prior to the Board's voting conference — protect against undue delay in the completion of the environmental review.[42]

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[40] See the comments of CSX, UP, RLD/AFL-CIO, and CPUC.

[41] This proposal was supported by Mayo Foundation d/b/a Mayo Clinic (Mayo), but UP objected to the potentially burdensome nature of such a requirement. To avoid imposing an undue burden on applicants, we will not specify here the type of information about grade crossings that applicants would have to provide. Rather, the information that is appropriate will depend on the circumstances of the individual case.

[42] As BNSF itself recognizes, the environmental review process in recent railroad merger transactions has not been prolonged. In CSX/NS/CR, the Final Environmental Impact Statement was completed in slightly less than 11 months from the filing of the application. In CN/IC, the Final Environmental Assessment was issued in less than 9 months from the date the application was filed.

Finally, NS expresses concern that our practice of using third-party contractors[43] to assist SEA in preparing environmental documentation prevents applicants from controlling the nature, cost, and scope of the work that will be required to complete the environmental analysis, while requiring them to fully fund the contractor's work. But as we have recently explained,[44] the current process is the most efficient and effective way for us to ensure a thorough, adequate, legally sound, and independent environmental review under NEPA. While we understand NS' concerns about costs, we see no way to set monetary limits at the outset of the NEPA process, because the NEPA analysis at times involves the discovery of unforeseen potential environmental impacts that require more analysis than originally contemplated. SEA's oversight and review of the process ensures that the work progresses as efficiently and cost effectively as possible. Finally, given our limited budget, there is no viable alternative to the use of third-party contractors to ensure a legally sufficient, timely environmental review in complex cases.[45]

***§ 1180.1(g): Oversight.*** *As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first 5 years following*

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[43] Third-party contracting is a voluntary arrangement in which the applicant pays for a contractor to assist SEA in developing environmental analyses necessary for compliance with NEPA and related environmental laws, under SEA's direction, control, and supervision. The government-wide regulations implementing NEPA, promulgated by the Council on Environmental Quality, specifically permit the use of third-party contractors in the preparation of environmental documentation, as do our own environmental regulations. 40 CFR 1506.5(c); 49 CFR 1105.10(d).

[44] See Policy Statement on Use of Third-Party Contracting In Preparation of Environmental Documentation, STB Ex Parte No. 585 (STB served Mar. 19, 2001).

[45] We note that certain commenters (Mayo, Mankato, Owatanna) raise environmental concerns (focusing primarily on rail construction proposals) that are beyond the scope of this proceeding. These commenters also are concerned that we not approve an application by a carrier with an adverse safety record unless we are satisfied that the carrier's safety performance would be raised to acceptable levels. Furthermore, they suggest that we address here (1) the importance of hearings (including on-site hearings) to obtain information about particular proposals and (2) the extent to which communities should be required to bear a share of the cost of environmental mitigation we impose. But these are the types of issues and concerns that can best be raised and addressed on a case-by-case basis in individual proceedings that may come before us.

Finally, certain commenters (CN, CP, BNSF) argue that our proposed rules involving transnational issues discriminate against Canadian and Mexican carriers by requiring only non-domestic railroad applicants to explain how cooperation with FRA would be maintained. This issue is addressed below in connection with § 1180.1(k).

*approval, applicants will be required to present evidence to the Board, on no less than an annual basis, to show that the merger conditions imposed by the Board are working as intended, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, and that the merger benefit projections accepted by the Board are being realized in a timely fashion. Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset adverse consequences of the underlying transaction.*

Our new rule on oversight codifies current practice. We have found a formal annual oversight process to be a useful mechanism for identifying and resolving competitive, environmental, and other problems that can arise following major rail consolidations. As is the case today, parties would retain the opportunity to petition us for immediate relief if they believe that is necessary.

With respect to environmental issues, as part of our oversight in past mergers we have imposed environmental conditions allowing communities or other interested parties to seek redress if there is a material post-merger change in the facts or circumstances upon which we relied in imposing specific environmental conditions. As noted in the NPR, we will continue to impose such conditions where appropriate.

Both railroad and community interests agree that there is a need to monitor merger implementation and, in appropriate situations, to address merger-related environmental harm.[46] AAR, CSX, and NS, however, ask that we clarify that there are limits on our authority to revisit environmental issues in the oversight process and to impose new conditions where circumstances turn out differently from what the parties had projected. The need to take further action is a fact-bound determination that can best be addressed on a case-by-case basis. Nevertheless, to provide some general guidance, we note here that, as we have previously recognized, in certain instances it can take longer than originally expected to achieve total compliance with our environmental conditions and that transitional problems generally do not warrant permanent remedies.[47] As we have indicated, it also is impossible to predict with certainty future traffic flows or traffic levels.

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[46] See, e.g., the comments of AAR, ORDC (environmental issues cannot always be adequately resolved before a merger is implemented), and Owatonna (requesting phased-in consummation of any major rail merger, with each new step to be implemented after previous ones have been successful).

[47] See CSX/NS/CR Oversight Dec. No. 5, slip op. at 29-31 (STB served Feb. 2, 2001).

Therefore, if railroads are to retain the ability to carry out their statutory obligation to provide common carrier service upon reasonable request, they must have the flexibility to adjust the level of train traffic over particular line segments in response to changes in shipper demands and in other market conditions.[48] In addition, a general oversight proceeding is not intended as a vehicle for parties to raise environmental issues that could have been but were not raised during the environmental review process.[49]

***§ 1180.1(h): Service assurance and operational monitoring.*** *(1) The quality of service is of vital importance. Accordingly, applicants must file, with their initial application and operating plan, a Service Assurance Plan identifying the precise steps they would take to ensure adequate service and to provide for improved service. This plan must include the specific information set forth at § 1180.10 on how shippers, connecting railroads (including Class II and III carriers), and ports across the new system would be affected and benefitted by the proposed consolidation. As part of this plan, applicants will be required to provide service benchmarks, describe the extent to which they have entered into any arrangements with shippers and shipper groups to compensate for service failures, and establish contingency plans that would be available to mitigate any unanticipated service disruption.*

*(2) The Board will conduct significant post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate.*

*(3) The Board also will require applicants to establish problem resolution teams and specific procedures for problem resolution to ensure that any unanticipated post-merger problems related to service or any other transportation matters, including claims, are promptly addressed. These teams should include representatives of all appropriate employee categories. Also, the Board envisions the establishment of a Service Council made up of shippers, railroads, passenger service representatives, ports, rail labor, and other interested parties to provide an ongoing forum for the discussion of implementation issues.*

*(4) Loss and damage claims handling. Shippers or shortlines who have freight claims under 49 CFR 1005 during merger implementation shall file such claims, in writing or electronically, with the merged carrier. The claimant shall provide supporting documentation regarding the effect on the claimant, and the specific damages (in a determinable amount) incurred. Pursuant to 49 CFR 1005, the merged carrier shall acknowledge each claim within 30 days and successively number each claim. Within 120 days of carrier receipt of the claim, the merged carrier shall respond to each claim by paying, declining, or offering a compromise settlement. The Board will take notice of these claims and their disposition as a matter of oversight. During each annual oversight period, the merged carrier shall report on claims received, their type, and their disposition for each quarterly period covered by oversight. While*

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[48] See CSX/NS/CR Dec. No. 96, slip op. at 22 (STB served Oct. 19, 1998).

[49] See id. at 30.

*shippers and shortlines may also contract with the applicants for specific remedies with respect to claims, final adjudication of contract issues as well as unresolved claims will remain a matter for the courts.*

*(5) Service failure claims. Applicants must suggest a protocol for handling claims related to failure to provide reasonable service due to merger implementation problems. Commitments to submit all such claims to arbitration will be favored.*

*(6) Alternative rail service. Where shippers and connecting railroads require relief from extended periods of inadequate service, the procedures at 49 CFR 1146 and 1147 are available for the Board to review the documented service levels and to consider shipper proposals for alternative service relief when other avenues of relief have already been explored with the merged carrier in an effort to restore adequate service.*

Given the importance of service to shippers, we are adding these new rules. We recognize that implementation of any merger plan necessarily has an element of uncertainty. We also recognize the importance of addressing these uncertainties, to the maximum extent possible, during the application process. Therefore, applicants' Service Assurance Plan for each major merger proposal should provide certain essential information, such as their plans to deal with any potential adverse service effects during implementation and to accommodate such less-than-optimum operations. Specifically, the plan must include information about proposed operational integration; training; information technology systems; customer service; coordination of freight and passenger operations; management of yard and terminal operations; contingency plans for service disruptions; how changes or increases in traffic levels would be accommodated by the combined system; infrastructure improvement; labor issues; service benchmarking;[50] and respective timetables for completion as appropriate. Moreover, the plan should identify and discuss potential areas of temporary or longer-term service degradation, and appropriate mitigation. To ensure that applicants would appropriately address any arising service problems, the Service Assurance Plan must provide for the establishment of problem resolution teams and describe the specific procedures to be utilized for problem resolution.

Having in place privately negotiated mechanisms for resolving implementation problems is also important. The Service Council format that applicant carriers and shippers have negotiated has proven extremely useful in past mergers, and we support the continuation of those informal processes for all future mergers. These councils should be broadened to include passenger, port, and rail labor interests.

In this regard, applicants are strongly encouraged to make a commitment in the application to submit to arbitration all claims of merger-related service failures, and such a commitment will be a consideration in the Board's review process. A program could be devised,

[50] "Benchmarking" refers to specific service levels before the transaction is implemented.

for example, to identify in advance levels of service failure that would be construed as a failure to provide common carrier service and to stipulate a system for compensating shippers that are harmed by such failures. With those standards in place, these disputes could be readily handled by an arbitrator if an affected shipper wishes to utilize such arbitration procedures.

Shippers, Class II and III railroads, and ports have indicated a need for more specific service assurances, which applicants can provide, and in this regard we expect applicants to negotiate in good faith with shippers and connecting carriers to address proposed service levels and appropriate service terms. The extent to which applicants offer an arbitration process for these issues will be important to our assessment of possible need for additional mitigation or offsetting conditions to address the risk of merger-related harm.

Shippers have noted that merging carriers have been slow to respond to claims for loss of or for damage to freight during periods of service disruptions. Thus, we will require that shippers and carriers adhere to our claims processing procedures at 49 CFR part 1005 and that periodically the merged carrier should report on merger-related claims. Even though such claims under the statute are not adjudicated by the Board, these new rules are intended to permit us to evaluate the claims handling performance of the applicant carriers during oversight.

Operational monitoring of previous transactions has proven vital to identifying and correcting operating deficiencies during implementation. The monitoring of key operational metrics has been useful to the Board in assessing the level of transportation services provided following a transaction and to the involved carriers in identifying areas for corrective action. We will continue to require the reporting of key operational data, including, but not necessarily limited to, terminal dwell hours and on-time train originations from major terminals. We will also require systemwide metrics for cars on line and average train velocity by commodity sector.

We agree with many shippers that properly benchmarked performance measures would aid in our assessment of the progress of a transaction after implementation. The corridor performance measurements we are requiring as benchmarks include corridor mileage, elapsed time, and carload volume by traffic type (merchandise, intermodal, automotive, unit coal, unit grain or others that are of significance), for carload traffic moving to and from major origins and destinations. The corridor performance benchmarks must include a sufficient number of representative traffic flows to permit an overall comparison of pre- and post-transaction performance. These measurements are not intended to reveal individual shipper transit times, but instead will show area-to-area averages. This information should prove beneficial to shippers and to the Board in measuring post-transaction performance on major corridors. Operational monitoring data requirements will incorporate at least the same data elements as required for benchmarking.

Should substantial service disruptions occur as the result of a merger's implementation, we are committed to considering alternative service arrangements promptly. Our procedures at 49 CFR 1146 and 1147 allow for a temporary substitution of another carrier's service for that of the carrier whose service is disrupted or inadequate. We can address merger-related service disruptions under these rules and will approve workable alternatives where appropriate to mitigate the disruption directly. Based on documented service performance and a reasonable opportunity for the incumbent carrier to improve its service, the Board will consider taking such actions as needed to resolve any merger-related disruption, while minimizing possible adverse impacts on the merged carrier or the substituted carrier.

Finally, we emphasize that our informal complaint-handling process will continue to be available. This process has provided shippers, small railroads, rail passengers, railroad employees, and others with immediate access to our problem resolution resources.

***§ 1180.1(i): Cumulative impacts and crossover effects.*** *Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation. The Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to explain how additional Class I mergers would affect the eventual structure of the industry and the public interest. Applicants should generally discuss the likely impact of such future mergers on the anticipated public benefits of their own merger proposal. Applicants will be expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should we approve any future consolidation(s).*

As noted in the NPR, our former rule at § 1180.1(g) stated a firm policy of not assessing the effect of potential or hypothetical combinations or transactions, so as to curb speculation and keep merger proceedings manageable. However, we know from the last round of mergers that another merger involving two very large railroads would not likely be an isolated event, but instead would trigger responsive proposals that, if granted, could well lead to a transcontinental railroad duopoly. Given the relatively small number of remaining Class I carriers, there is now a limited range of responsive proposals that could be triggered by any particular transaction. Because from this point on any proposed major transaction would have a significant effect on the structure of the entire industry, we will consider reasonable arguments about likely future transactions and about the future structure of the industry. Moreover, we will consider arguments that conditions imposed in prior mergers would be impaired and that we should revise them to the extent necessary to prevent that result.

**Downstream effects.** Although there is general agreement that applicants should address the likely effects of any other merger that is actually proposed in response to a particular

transaction, many railroads indicate that it would be extremely speculative for them to forecast the precise actions of their competitors in response to a merger application. AAR and various railroads are concerned that we will expect an unrealistic level of detail in applicants' supporting materials concerning these issues. AAR and other railroad interests recognize that applicants could discuss the possible contours of future mergers and their effects on the market, but that a quantitative analysis of public benefits in light of future transactions would be problematic.

We agree with these concerns, and we will not require applicants to present alternative merger benefit calculations based on specific alternative possible responses that could be filed by various carriers. Rather, our intent is simply to require applicants to initiate a commentary, to which other parties could respond, that would give us the information we need to rule on what could likely be the first step in an end-game situation in which only two or three competing transcontinental carriers would remain in North America. We need to develop a consistent set of principles for analyzing all of the applications that could be brought to us in such a final round of mergers. We can meet our responsibility only if applicants file their preliminary evidence about the evolving structure of the industry that would likely result from their proposal and others like it; if they address the merits of such a structure; if they provide their views on how to deal with potential problems that structure could cause to service, efficiency, and competition; and if other affected parties then come in and express their concerns on a full record.

UP cautions that we should not attempt to reserve unlimited power to impose what it describes as "springing conditions," that is, conditions that would be activated by future mergers. We agree that any post-merger conditions would have to be used sparingly, or else they would undermine the predictability and finality that carriers need to have in order to consummate any merger transaction.

Questions have been raised as to whether we would consolidate any contemporaneous applications, but we need to address that issue on a case-by-case basis and with the benefit of downstream effects discussions more concrete than those that have been presented to date. It is impossible for us to predict at this point how close together any applications might be filed and what logistics would be involved with simultaneously dealing with more than one application.[51]

**Upstream effects.** As KCS and others have suggested, we might need to use our conditioning power to repair a condition from a previous merger that would be substantially impaired by a new merger that we approve. We have provided such relief in the past, where

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[51] IMPACT has suggested a 36-month cooling-off period between the implementation of one merger and the filing of the next. This suggestion appears to be inconsistent with our statute, which requires us to complete our consideration of rail merger applications within a certain time period.

appropriate and where the party for whose benefit the condition was originally imposed seeks that relief in the new merger proceeding.[52]

We can also consider whether specific previously imposed conditions may no longer be necessary in light of subsequent transactions or subsequent legislation or economic developments, as we did in Traffic Protective Conditions, 366 I.C.C. 112 (rate equalization provisions no longer imposed to keep routes open in mergers), aff'd in relevant part, Detroit, T. & I.R.R. v. United States, 725 F.2d 47 (6th Cir. 1984). However, we could not simply retroactively apply our new standards to past mergers, as KCS and others have suggested. See Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988); Landgraf v. USI Film Products, 511 U.S. 244, 269 (1994). Rather, absent some failure of a condition that we imposed, or some specific reservation of jurisdiction through oversight or otherwise, it would generally not be appropriate for us to impose new conditions on our approval of a transaction that has already been consummated.[53]

***§ 1180.1(j): Inclusion of other carriers.*** *The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.*

This rule merely carries forward the prior provision at former § 1180.1(e) concerning requests for inclusion. We believe that it is appropriate to continue to view inclusion of non-applicant carriers as a matter of last resort.

***§ 1180.1(k): Transnational and other informational issues.*** *(1) All applicants must submit "full system" competitive analyses and operating plans — incorporating any operations in Canada or Mexico — from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States, and explain*

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[52] We are not adopting KCS' proposal to require applicants to list every condition that the ICC or STB has ever imposed on the applicant carriers in the past. Parties that believe a particular condition is still required but would be impaired by a proposed transaction should bring that matter to our attention.

[53] While we have express authority under 49 U.S.C. 11327 to issue supplemental orders in appropriate situations in rail merger cases, that authority must necessarily be used very cautiously and sparingly once the parties to an approved merger no longer have the opportunity to elect not to proceed if they are unwilling to accept all of the conditions that we have placed on our approval of their proposal.

*how cooperation with the Federal Railroad Administration would be maintained to address potential impacts on operations within the United States of operations or events elsewhere on their systems. All applicants must further provide information concerning any restrictions or preferences under foreign or domestic law and policies that could affect their commercial decisions. Applicants must also address how any ownership restrictions might affect our public interest assessment.*

*(2) The Board will consult with relevant officials, as appropriate, to ensure that any conditions it imposes on an approved transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination.*

As noted in the NPR, future major transnational mergers are likely to raise novel jurisdictional, national interest, and public interest issues. We need to be able to gather information about relevant facts, laws and policies that are important to an accurate and comprehensive understanding of a major transnational merger application. Although NAFTA may forbid us from imposing certain limitations on rail ownership by Canadian or Mexican nationals, it does not preclude us from gathering the information that we need to do our job.

The comments have convinced us, however, that the proposed rule requiring certain information only from Canadian and Mexican railroads was too narrow in scope and also may have unnecessarily risked conflict with NAFTA's prohibitions against disparate national treatment. While the genesis of the proposed rule was the prospect of needing to address issues relating particularly to Canadian applications, we conclude that, in the end, we need similar information from all applicants, foreign or domestic. Thus, in addition to full-system competitive analyses and operating plans (including plans for FRA cooperation) required of applicants with transnational operations, we will require all applicants to address any ownership restrictions (by law or corporate initiative), and any pertinent governmental restrictions or preferences.

This requirement is not intended to prompt an applicant's search through every conceivably relevant statute. We are most concerned about laws, policies, and corporate actions that might unduly interfere with the market (including the market for corporate control) or that might create an unlevel playing field. That information is clearly related to our legitimate regulatory objectives, and is intended to treat equally, and not burden or prejudice, any applicant.

***§ 1180.1(l): National defense.*** *Rail mergers must not detract from the ability of the United States military to rely on rail transportation to meet the nation's defense needs. Applicants must discuss and assess the national defense ramifications of their proposed merger.*

The Military Traffic Management Command Transportation Engineering Agency (MTMCTEA) of the Department of Defense (DOD) is responsible for carrying out DOD's "Railroads for National Defense" Program (RNDP), and supervising DOD's national defense requirements. MTMCTEA indicates that, in cooperation with FRA, it conducts periodic readiness reviews of civil rail lines deemed important to the national defense. MTMCTEA recommends that all applicants be required to address the impact of a merger on: maintenance and traffic levels on the Strategic Rail Corridor Network (STRACNET) and connector lines; priority of DOD freight in the event of war; service, routing and equipment agreements between DOD and the merging carriers; and the potential transfer of ownership to a third party without further regulatory review or approval.[54] Finally, MTMCTEA contends that a significant diversion of rail traffic from U.S. to foreign ports could threaten the economic health of U.S. ports and undermine the national defense. It argues that the likelihood of such a traffic shift should be assessed in our merger review.[55]

Applicants in major mergers must discuss national defense ramifications. As proposed, we will consider issues relating to ports in assessing a merger's potential harm to essential services, see § 1180.1(c)(2)(ii). No rule giving priority to DOD traffic during a war or other emergency is required here because there are existing statutory provisions governing these matters. See 49 U.S.C. 11124 (on Presidential demand or notice during war or threat of war, railroads must give preference to military traffic); 10 U.S.C. 2644 (President in time of war may "take possession and assume control of all or part of any system of transportation").

MTMCTEA asks us to require applicants to describe the degree to which DOD traffic would be routed over foreign lines. But our rules will now require the disclosure of significant changes in traffic flows, see §1180.10(a). Significant impacts of a merger on maintenance and traffic levels on STRACNET lines, another concern of MTMCTEA, can also be monitored through the operating plan that must be included in an application. Thus, the application will give DOD access to information about potential impacts on military traffic movements, including information about anticipated shifts of its traffic from domestic to foreign lines, and it can object if it has concerns.[56] Finally, we cannot devise rules concerning the transfer of ownership to

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[54] In addition, MTMCTEA supports our proposals for at least 5 years of oversight, post-merger monitoring of rail service and operations, and elimination of the "one case at a time" rule.

[55] ORDC urges us to include MTMCTEA's specific recommendations in our final rules.

[56] CN notes that the principal current component of U.S.–Canada–U.S. routing (i.e., traffic moving between Michigan and Northeast U.S. via Southern Ontario and Quebec) would not change in the event of a U.S.–Canadian railroad merger. Because successful merger applicants would be required to maintain major gateways, DOD's interests will be further

(continued...)

persons that are not affiliated with a rail carrier, as MTMCTEA suggests, as such transfers do not require our regulatory approval regardless of the nationality of the seller or purchaser.

***§ 1180.1(m): Public participation.*** *To ensure a fully developed record on the effects of a proposed railroad consolidation, the Board encourages public participation from federal, state, and local government departments and agencies; affected shippers, carriers, and rail labor; and other interested parties.*

This rule carries forward our prior provision at § 1180.1(h), which encourages public participation in our merger proceedings, except that it will now specifically reference rail labor. Input from federal, state, and local governments; affected shippers, carriers, and rail labor; and other parties continues to be of crucial importance in allowing us to make our public interest determinations.

**TECHNICAL and INFORMATIONAL REVISIONS.**

We are making a number of technical revisions to our merger regulations. For the most part, these revisions codify current practice and conform our regulations to the waivers and clarifications that we have routinely granted in recent merger proceedings. We also include language, where appropriate, reflecting changes in the supporting informational requirements to carry out the proposed revisions to the merger policy statement at § 1180.1, discussed above.

**§ 1180.0 Scope and purpose.**

***§ 1180.0(a): General.*** *The regulations in this subpart set out the information to be filed and the procedures to be followed in control, merger, acquisition, lease, trackage rights, and any other consolidation transaction involving more than one railroad that is initiated under 49 U.S.C. 11323. Section 1180.2 separates these transactions into four types: Major, significant, minor, and exempt. The informational requirements for these types of transactions differ. Before an application is filed, the designation of type of transaction may be clarified or certain of the information required may be waived upon petition to the Board. This procedure is explained in § 1180.4. The required contents of an application are set out in §§ 1180.6 (general information supporting the transaction), 1180.7 (competitive and market information), 1180.8 (operational information), 1180.9 (financial data), 1180.10 (service assurance plans), and 1180.11 (transnational and other informational requirements). A major application must contain the information required in §§ 1180.6(a), 1180.6(b), 1180.7(a), 1180.7(b), 1180.8(a), 1180.8(b), 1180.9, 1180.10, and 1180.11. A significant application must contain the information required in §§ 1180.6(a), 1180.6(c), 1180.7(a), 1180.7(c), and 1180.8(b). A minor application must contain the information required in §§ 1180.6(a) and 1180.8(c). Procedures (including*

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[56](...continued)
protected. See §1180.1(c)(2).

*time limits, filing requirements, participation requirements, and other matters) are contained in § 1180.4. All applications must comply with the Board's Rules of General Applicability, 49 CFR parts 1100 through 1129, unless otherwise specified. These regulations may be cited as the Railroad Consolidation Procedures..*

***§ 1180.0(b): Waiver.*** *We will waive application of the regulations contained in this subpart for a consolidation involving The Kansas City Southern Railway Company and another Class I railroad and will apply the prior regulations instead, unless we are shown why such a waiver should not be allowed. Interested parties must file any objections to this waiver within 10 days after the applicants' prefiling notification (see 49 CFR § 1180.4(b)(1)).*

We are making conforming changes to subsection (a) to reflect changes in our informational requirements and deleting obsolete references to Index I and Index II. As discussed above, we are also adding a new subsection (b) to waive these new regulations for consolidations between KCS and another Class I railroad and allow for our prior regulations to apply, unless parties persuade us otherwise.

**§ 1180.3 Definitions.**

***§ 1180.3(a): Applicant.*** *The term applicant means the parties initiating a transaction, but does not include a wholly owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier. Parties who are considered applicants, but for whom the information normally required of an applicant need not be submitted, are:*

*(1) in minor trackage rights applications, the transferor and*

*(2) in responsive applications, a primary applicant.*

Under the prior rules, "[t]he parties initiating a transaction" technically included not only the ultimate railroad holding company and its Class I railroad subsidiary (e.g., Union Pacific Corporation and Union Pacific Railroad Company) but also wholly owned shell company subsidiaries (which have often been set up in connection with merger transactions) and wholly owned intermediate holding companies (which have often existed in connection with Class I railroads). Because we typically have found that there is no need to treat either a wholly owned shell company subsidiary or a wholly owned intermediate holding company as an applicant, our waiver decisions in past proceedings reflect a recognition that the prior § 1180.3(a) definition is simply too broad. We are therefore excluding from "applicant" status any non-rail subsidiaries.

***§ 1180.3(b): Applicant carriers.*** *The term applicant carriers means: any applicant that is a rail carrier; any rail carrier operating in the United States, Canada, and/or Mexico in which an applicant holds a controlling interest; and all other rail carriers involved in the transaction. Because the service provided by these commonly controlled carriers can be an important competitive aspect of the transactions that we approve, applicant carriers are subject to the full*

*range of our conditioning power. Carriers that are involved in an application only by virtue of an existing trackage rights agreement with applicants are not applicant carriers.*

Under our previous definition, the term "all carriers related to the applicant" included not only rail carriers related to applicants and subject to our jurisdiction but also three additional categories of carriers: rail carriers not subject to our jurisdiction; rail carriers subject to our jurisdiction but with respect to which the related applicant does not hold a controlling interest; and non-rail carriers. Our waiver decisions in past proceedings have recognized that this definition is too broad. We are now excluding from "applicant carrier" status: (i) rail carriers with respect to which the related applicant does not hold a controlling interest; and (ii) non-rail carriers.[57] We will not exclude foreign carriers over which we otherwise lack jurisdiction.

We are also clarifying that applicant carriers are subject to the full range of our conditioning power. When we approve a transaction, these carriers also fall under common control with the newly controlled carrier or rail assets, and we must necessarily assess the competitive and other aspects of this arrangement.

**§ 1180.4 Procedures.**

***§ 1180.4(a)(1): General****. (1) The original and 25 copies of all documents shall be filed in major proceedings. The original and 10 copies shall be filed in significant and minor proceedings.*

We are revising § 1180.4(a)(1) to reflect our current practice regarding the number of copies required in major merger proceedings. Although prior § 1180.4(a)(1) called for 20 copies in such proceedings, our most recent decisions have called for 25, because the additional copies have served to facilitate immediate internal distribution of filings for handling by Board personnel whose input is essential to prompt disposition of the many matters raised in connection with major railroad merger proceedings.

***Deletion of § 1180.4(a)(4): Service Lists.*** We are deleting § 1180.4(a)(4), which provides deadlines for the issuance of service lists. While service lists will still have to be issued, as with all matters connected with procedural schedules, this timing question is best handled on a case-by-case basis.

***§ 1180.4(b)(4): Prefiling notification.*** *When filing the notice of intent required by paragraph (b)(1) of this section, applicants also must file:*

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[57] Although we are excluding these carriers from applicant status, they may need to be identified either in the corporate chart required by § 1180.6(b)(6), or in the statement of direct or indirect intercorporate or financial relationships required by § 1180.6(b)(8).

*(i) A proposed procedural schedule. In any proceeding involving either a major transaction or a significant transaction, the Board will publish a Federal Register notice soliciting comments on the proposed procedural schedule, and will, after review of any comments filed in response, issue a procedural schedule governing the course of the proceeding.*

*(ii) A proposed draft protective order. The Board will issue, in each proceeding in which such an order is requested, an appropriate protective order.*

*(iii) A statement of waybill availability for major transactions. Applicants must indicate, as soon as practicable after the issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request. The applicants may require that, if the requesting party is itself a railroad, applicants will make their 100% traffic tapes available to that party only if it agrees, in its written request, to make its own 100% traffic tapes available to applicants (subject to the terms of the protective order) when it receives access to applicants' tapes.*

*(iv) Applicants may also propose the use of a voting trust at this stage, or at a later stage, if that becomes necessary. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.*

We are adding these new prefiling requirements to replace the prior rules in § 1180.4(d)(1)-(3), which prescribed a procedural schedule that has not actually been followed for many years. In recent cases, procedural schedules have been established on a case-by-case basis tailored to what is suited to the full and fair development of the record for that particular proposal. Our new rules also establish a new procedure for use of voting trusts and new procedures for obtaining access to confidential railroad traffic tapes.

**Procedural schedule.** BNSF argues that we need to process merger applications in 12 months or less, including the pre-notice period. Although the statute provides for a 16-month processing period from the time of filing the application, we have endeavored to complete our review process as quickly as possible. We recognize that capital markets are sensitive to uncertainty and delay. Nevertheless, 12 months could be an unduly short period to build a record, allow for full public participation, and complete the necessary environmental documentation for the large, transcontinental mergers that we may be asked to consider.

Thus, we are codifying our present practice for establishing a customized procedural schedule by requiring merger applicants to file a proposed procedural schedule when they file their notice of intent. We anticipate that, in each proceeding involving either a major or significant transaction: the proposed procedural schedule would be published in the Federal Register, comments would be solicited, and a final procedural schedule would then be adopted.

**Protective order.** Merger review proceedings frequently require parties to gain discovery of, or submit evidence about, commercially sensitive information. Some types of information are statutorily protected against disclosure. Accordingly, we have developed a protocol under which particularly sensitive "highly confidential" information will be disclosed only to outside counsel or consultant of a party, and only upon that outside counsel/consultant's signing of a confidentiality agreement. If highly confidential material is submitted in evidence, it is submitted under seal, and is available for inspection only by outside counsel or consultant who have signed confidentiality agreements. This prevents the information from being disclosed to the parties themselves and used for purposes beyond the merger review proceeding.

To codify our present practice for establishing a protective order, we are requiring that applicants include a proposed draft protective order with their notice of intent. But, there is no compelling reason to include a standard protective order in our regulations.

Several parties have suggested that applicants be required to disclose publicly the terms of all settlement agreements related to their merger proposal. We believe that this would undermine our policy of encouraging private settlement agreements. Applicant carriers are much more likely to agree to concessions if confidentiality is preserved. Applicants do, of course, retain the option of making settlements public, to the extent permitted by their agreements and as necessary to secure favorable consideration of their proposed transaction. And the Board will continue to permit such agreements to be submitted confidentially, and will impose them as conditions as appropriate. (See the previous discussion of negotiated agreements in the discussion accompanying the rules dealing with environmental review.)

UTU/GO 386 argues that our merger review process is conducted secretly prior to an application being filed. UTU/GO 386 totally misunderstands the pre-filing stage of the process. The only contact between applicants and agency staff on other than procedural matters takes place with the environmental staff. And the only matters that are discussed with that staff relate to the appropriate environmental review, and how it can be accomplished in a timely manner. Contact between applicants and staff concerning the merits of the transaction is not permitted during the pre-filing period or any other stage of the review process. Similarly, UTU/GO 386's argument that most of the critical evidence in a merger case is filed under seal is simply not true. Most of the evidence is filed in public documents. Only evidence that is truly commercially confidential may be filed under seal, and that evidence is available for inspection by counsel or consultant for interested parties who sign confidentiality agreements. This process has worked well, and we see no reason to change it.

**Traffic tapes.** We are requiring that applicants contemplating a major transaction make their highly confidential 100% traffic tapes available to outside counsel or consultants for interested parties — subject to an appropriate protective order — as soon as practicable after the filing of the notice of intent. Early access to this critical traffic data would aid interested parties

in the preparation of their own submissions but (unlike broad pre-application discovery, which we are not proposing) would not impede the prospective applicants in the preparation of their application. If the party seeking the applicants' 100% traffic tapes is itself a railroad, it must provide applicants' counsel or consultants with reciprocal access to its own 100% traffic tapes, subject to an appropriate protective order.

***§ 1180.4(c)(6): Application format.*** *(vi) The information and data required of any applicant may be consolidated with the information and data required of the affiliated applicant carriers.*

We are adding to the rule at § 1180.4(c)(6) a new clause (vi) to codify our practice in past waiver decisions of authorizing the filing of consolidated information and data pertaining to each applicant and the rail subsidiaries it controls.

***§ 1180.4(d): Responsive applications.***

*(1) No responsive applications shall be permitted to minor transactions.*

*(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for the type of transaction involved. See 49 CFR 1002.2(f)(38)-(41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).*

*(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.*

As discussed earlier, we are adopting new requirements at § 1180.4(b)(4) replacing prior § 1180.4(d)(1)-(3), which had set forth a procedural schedule for the filing of pleadings by parties other than the primary applicants. That schedule has not actually been followed for many years. Here, we are retaining the non-scheduling portion of the prior rules at § 1180.4(d)(4) with regard to responsive applications.

***§ 1180.4(e): Evidentiary proceeding.***

*§ 1180.4(e)(2). The evidentiary proceeding will be completed:*

*(i) within 1 year after the primary application is accepted for a major transaction;*

*(ii) within 180 days for a significant transaction; and*

*(iii) within 105 days for a minor transaction.*

*§ 1180.4(e)(3). A final decision on the primary application and on all consolidated cases will be issued:*

*(i) within 90 days after the conclusion of the evidentiary proceeding for a major transaction;*

*(ii) within 90 days for a significant transaction; and*

*(iii) within 45 days for a minor transaction.*

Prior § 1180.4(e)(2) and (3) tracked the pre-1996 statutory time frames contained in the predecessor to what is now 49 U.S.C. 11325. We are revising this provision to track the new statutory timeframes of 49 U.S.C. 11325.

***§ 1180.4(f): Waiver or clarification.***

*§ 1180.4(f)(2) Except as otherwise provided in the procedural schedule adopted by the Board in any particular proceeding, petitions for waiver or clarification must be filed at least 45 days before the application is filed.*

Prior § 1180.4(f)(2) provided that, with one specified exception, petitions for waiver or clarification had to be filed at least 45 days before the application is filed. We are revising § 1180.4(f)(2) to conform to new § 1180.4(d).

**§ 1180.6 Supporting information.**

***§ 1180.6(b)(1): Form 10-K (exhibit 6).*** *Submit: the most recent filing with the Securities and Exchange Commission (SEC) under 17 CFR 249.310 made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form 10-K subsequently filed with the SEC during the pendency of the proceeding.*

Although most Class I railroads are wholly owned subsidiaries of noncarrier holding companies, prior § 1180.6(b)(1) required the submission, in major merger proceedings, of the applicant carriers' most recently filed Form 10-K. We have revised this provision, consistent with our recent waiver decisions, to substitute the Form 10-K of the controlling, noncarrier entity where the applicant carrier does not currently file a Form 10-K with the SEC.

***§ 1180.6(b)(2): Form S-4 (exhibit 7)****. Submit: the most recent filing with the SEC under 17 CFR 239.25 made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form S-4 subsequently filed with the SEC during the pendency of the proceeding.*

Prior § 1180.6(b)(2) has been revised for two reasons. First, Form S-14, cited in prior § 1180.6(b)(2), has been replaced by Form S-4. Second, although most Class I railroads are wholly owned subsidiaries of noncarrier holding companies, prior § 1180.6(b)(2) required the submission, in major merger proceedings, of the applicant carriers' most recently filed Form S-14. Our revisions are consistent with our recent waiver decisions.

***§ 1180.6(b)(3): Change in control (exhibit 8).*** *If an applicant carrier submits an annual report Form R-1, indicate any change in ownership or control of that applicant carrier not indicated in its most recent Form R-1, and provide a list of the principal six officers of that*

*applicant carrier and of any related applicant, and also of their majority-owned rail carrier subsidiaries. If any applicant carrier does not submit an annual report Form R-1, list all officers of that applicant carrier, and identify the person(s) or entity/entities in control of that applicant carrier and all owners of 10% or more of the equity of that applicant carrier.*

Prior § 1180.6(b)(3) required major merger applicants to "[i]ndicate any change in ownership, control, or officers not indicated in the most recent annual report Form R-1." There are two problems here: (1) although most Class I railroads have hundreds of officer positions that might fall within the scope of the "change in officers" requirement, the compilation of such a list would be burdensome to applicants and of little, if any, value to us and to the public; and (2) because only Class I railroads now submit Form R-1, it was not clear what was required with respect to Class II and III rail carriers that qualify as applicant carriers. We have therefore revised the rule to be consistent with our recent waiver decisions.

***§ 1180.6(b)(4): Annual reports (exhibit 9).*** *Submit: the two most recent annual reports to stockholders by each applicant, or by any entity that is in control of an applicant, made within 2 years of the date of filing of the application. These shall not be incorporated by reference, and shall be updated with any annual or quarterly report to stockholders issued during the pendency of the proceeding.*

Prior § 1180.6(b)(4) required the submission, in major merger proceedings, of the applicant carriers' two most recent annual reports; however, most Class I railroads are wholly owned subsidiaries of noncarrier holding companies and do not make separate annual reports to their stockholders. We have thus revised this provision to be consistent with our recent waiver decisions.

***§ 1180.6(b)(6): Corporate chart (exhibit 11).*** *Submit a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity (with each chart indicating the percentage ownership of every company on the chart by any other company on the chart). For each company: include a statement indicating whether that company is a noncarrier or a carrier; and identify every officer and/or director of that company who is also an officer and/or director of any other company that is part of a different corporate family that includes a rail carrier. Such information may be referenced through notes to the chart.*

The "corporate chart" provision must be revised because the prior requirement of a statement indicating all common officers and directors sweeps too broadly; the only disclosure that is really needed in this context concerns individuals who hold officer and/or director positions in more than one corporate family, where the nonapplicant corporate family or families includes a rail carrier. We have thus revised our rule to permit major merger applicants to disregard common officers and/or directors within a single corporate family, and to report only

those instances in which two or more companies from different corporate families, each including a rail carrier, share officers and/or directors.

***§ 1180.6(b)(8): Intercorporate or financial relationships.*** *Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed elsewhere in the application, through holding companies, ownership of securities, or otherwise, in which applicants or their affiliates own or control more than 5% of the stock of a non-affiliated carrier, including those relationships in which a group affiliated with applicants owns more than 5% of the stock of such a carrier. Indicate the nature and extent of any such relationships, and, if an applicant owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, the par value of each class of securities held, and the applicant's percentage of total ownership. For purposes of this paragraph, "affiliates" has the same meaning as "affiliated companies" in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).*

Our prior rule required major merger applicants to disclose all intercorporate or financial relationships between applicant carriers and persons affiliated with applicant carriers, on the one hand, and, on the other hand, other carriers or persons affiliated with such other carriers. Recent waiver decisions, however, have established that the only disclosure that is really needed in this context is of "significant" intercorporate or financial relationships, i.e., relationships involving ownership by applicants and/or their affiliates of more than 5% of a non-affiliated carrier's stock, including those relationships in which a group affiliated with applicants owns more than 5% of a non-affiliated carrier's stock. We have revised the rule to conform to the waiver decisions issued in recent proceedings and, in accordance with those decisions, we have changed the focus of this provision from "applicant carriers" to "applicants."

***§ 1180.6(b)(9): Employee impact exhibit.*** *The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impacts would occur, the time frame of the impacts (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. This information (except with respect to employee protection agreements) may be set forth in the following format:*

*EFFECTS ON APPLICANT CARRIERS' EMPLOYEES*

| *Current* | | *Jobs* | *Jobs* | *Jobs* | |
|---|---|---|---|---|---|
| *Location* | *Classification* | *Transferred to* | *Abolished* | *Created* | *Year* |

We have created a new § 1180.6(b)(9), applicable only to major transaction applications. For major merger transactions, we have considered three suggested revisions of the prior

§ 1180.6(a)(2)(v) "employee impact exhibit" requirement.[58] First, we are declining to narrow its scope to the effects of the proposed transaction upon applicant carriers' employees *in the U.S.* Rather, any major transnational merger that may come before us in the future would be such as to require knowledge, on our part, of the effects of the proposed transaction upon all applicant carriers' employees, regardless of whether they are located in Canada, Mexico, or elsewhere. Second, we do not believe it appropriate to amend our rule (as requested by carrier interests) to attempt to specify a single set of classes or crafts of employees to be covered by the required employee impact exhibit because past decisions have not established, in this respect, the necessary uniformity. Third, our rule has been revised to specify the format of the required employee impact exhibit. Past decisions have established, in this respect, the necessary uniformity.[59]

***§ 1180.6(b)(10): Conditions to mitigate and offset merger-related harms.*** *Applicants are expected to propose measures to mitigate and offset merger-related harms. These conditions should not simply preserve, but also enhance, competition.*

*(i) Applicants must explain how they would preserve competitive options for shippers and for Class II and III rail carriers. At a minimum, applicants must explain how they would preserve the use of major existing gateways, the potential for build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.*

*(ii) Applicants should explain how the transaction and conditions they propose would enhance competition and improve service.*

We have added this new rule to implement our new policy at § 1180.1, requiring applicants in major merger transactions to propose conditions preserving shippers' existing competitive options, and suggesting that they propose additional conditions or other means to enhance competition and improve services that would offset anticompetitive effects, transitional service problems, and other merger-related harms.

***§ 1180.6(b)(11): Calculating public benefits.*** *Applicants must enumerate and, where possible, quantify the net public benefits their merger would generate (if approved). In making this estimate, applicants should identify the benefits that would arise from service improvements, enhanced competition, cost savings, and other merger-related public interest benefits, and should discuss whether the particular benefits they are relying upon could be achieved short of*

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[58] We are making no changes in § 1180.6(a)(2)(v), which continues to apply to major, significant, and minor applications.

[59] We note that the "Jobs Transferred To" column will capture, among other things, anticipated cross-border transfers.

*merger. Applicants must also identify, discuss, and, where possible, quantify the likely negative effects approval would entail, such as losses of competition, potential for service disruption, and other merger-related harms. In addition, applicants must suggest additional measures that the Board might take if it approves the application and the anticipated public benefits identified by applicants fail to materialize in a timely manner.*

We have added this new rule for major transactions reflecting our new policy at § 1180.1. Because we must weigh the application's effect on the public interest, it is important that we carefully calculate the net public benefits a merger would generate, and, to do so, the applicants must provide detailed and accurate data. Moreover, as discussed previously, we have created an incentive for carriers not to exaggerate benefits.

***§ 1180.6(b)(12): Downstream merger applications.*** *(i) Applicants should anticipate whether additional Class I mergers are likely to be proposed in response to their own proposal and explain how, taken together, these mergers, if approved, could affect the eventual structure of the industry and the public interest.*

*(ii) Applicants are expected to discuss whether any conditions imposed on an approval of their proposed merger would have to be altered, or any new conditions imposed, if the Board should approve additional future rail mergers.*

In adopting this new rule for major transactions, we have discarded the "one case at a time" policy. We expect applicants generally to identify the likely strategic responses of other Class I carriers and anticipate how, taken together, these various proposals would affect the structure of the industry and the public interest.

***§ 1180.6(b)(13): Purpose of the proposed transaction.*** *The purpose sought to be accomplished by the proposed transaction, such as improving service, enhancing competition, strengthening the nation's transportation infrastructure, creating operating economies, and ensuring financial viability.*

Consistent with the goals of our policy statement, we have revised this rule so that the list of merger-related accomplishments associated with a proposal for a major transaction would stress enhancing competition and strengthening transportation infrastructure, as well as improving service. This provision also looks to applicants for evidence demonstrating their financial viability.

**§ 1180.7 Market analyses.**

***§ 1180.7(a):*** *For major and significant transactions, applicants shall submit impact analyses (exhibit 12) describing the impacts of the proposed transaction — both adverse and beneficial — on inter- and intramodal competition with respect to freight surface transportation in the regions affected and on the provision of essential services by applicants and other*

*carriers. An impact analysis should include underlying data, a study of the implications of those data, and a description of the resulting likely effects of the proposed transaction on the transportation alternatives that would be available to the shipping public. Each aspect of the analysis should specifically address significant impacts as they relate to the applicable statutory criteria (49 U.S.C. 11324(b) or (d)), essential services, and competition. Applicants must identify and address relevant markets and issues, and provide additional information as requested by the Board on markets and issues that warrant further study. Applicants (and any other party submitting analyses) must demonstrate both the relevance of the markets and issues analyzed and the validity of their methodology. All underlying assumptions must be clearly stated. Analyses should reflect the consolidated company's marketing plan and existing and potential competitive alternatives (inter- as well as intramodal). They can address: city pairs, interregional movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that would be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).*

***§ 1180.7(b):*** *For major transactions, applicants shall submit "full system" impact analyses (incorporating any operations in Canada or Mexico) from which they must demonstrate the impacts of the transaction — both adverse and beneficial — on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition) and the provision of essential services (including freight, passenger, and commuter) by applicants and other network links (including Class II and Class III rail carriers and ports). Applicants' impact analyses must at least provide the following types of information:*

*(1) The anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives available to the shipping public. Consistent with § 1180.6(b)(10), these would incorporate a detailed examination of any competition-enhancing aspects of the transaction and of the specific measures proposed by applicants to preserve existing levels of competition and essential services;*

*(2) Actual and projected market shares of originated and terminated traffic by railroad for each major point on the combined system. Applicants may define points as individual stations or as larger areas (such as Bureau of Economic Analysis statistical areas or U.S. Department of Agriculture Crop Reporting Districts) as relevant and indicate the extent of switching access and availability of terminal belt railroads. Applicants should list points where the number of serving railroads would drop from two to one and from three to two, respectively, as a result of the proposed transaction (both before and after applying proposed remedies for competitive harm);*

*(3) Actual and projected market shares of revenues and traffic volumes for major interregional or corridor flows by major commodity group. Origin/destination areas should be defined at relevant levels of aggregation for the commodity group in question. The data should be broken down by mode and (for the railroad portion) by single-line and interline routings (showing gateways used);*

*(4) For each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes;*

*(5) Maps and other graphic displays where helpful in illustrating the analyses in this section;*

*(6) An explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services; and*

*(7) Supporting data for the analyses in this section, such as the basis for projections of changes in traffic patterns, including shipper surveys and econometric or other statistical analyses. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.*

*(8) If necessary, an explanation as to how the lack of reliable and consistent data has limited applicants' ability to satisfy any of the above requirements.*

***§ 1180.7(c):*** *For significant transactions, specific regulations on impact analyses are not provided so that the parties will have the greatest leeway to develop the best evidence on the impacts of each individual transaction. As a general guideline, applicants shall provide supporting data that may (but need not) include: current and projected traffic flows; data underlying sales forecasts or marketing goals; interchange data; market share analysis; and/or shipper surveys. It is important to note that these types of studies are neither limiting nor all-inclusive. The parties must provide supporting data, but are free to choose the type(s) and format. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.*

This section replaces prior § 1180.7, encompassing market analyses in major and significant transactions. For major transactions, we are revising this rule to reflect our concern that applicants' impact analyses should reflect the entire North American rail system. All applicants will be required to provide us with information on their Canadian and Mexican operations and marketing plans so that we can fully determine the effects of the application on competition and the provision of essential services within the United States.

We are setting minimum requirements to replace the discretionary guidelines that have been in use for market analyses in major transactions. These ensure that applicants will supply the types of information that we have found most helpful in assessing harm to competition or to essential services in previous major merger transactions. We are explicitly requiring data on how the proposed transaction would affect geographic competition and product competition, as well

as on how the transaction would affect market concentration for major origin and destination points and for major corridors on the applicants' combined system.

Finally, these impact analyses should incorporate a detailed examination of the ways in which the transaction would enhance competition. Applicants must set out the specific measures they propose to preserve existing levels of competition and essential services.

For significant transactions, we are not amending the information requirements or impact analyses.

**§ 1180.8 Operational data.**

***§ 1180.8(a)**: Applications for major transactions must include a full-system operating plan — incorporating any prospective operations in Canada and Mexico — from which they must demonstrate how the proposed transaction would affect operations within regions of the United States and on a nationwide basis. As part of the environmental review process, applicants shall submit:*

*(1) A Safety Integration Plan, prepared in consultation with the Federal Railroad Administration, to ensure that safe operations would be maintained throughout the merger implementation process.*

*(2) Information on what measures they plan to take to address potentially blocked crossings as a result of merger-related changes in operations or increases in rail traffic.*

We have added this new rule setting forth some additional informational requirements on applicants in major transactions. In major transactions, we will require full-system operating plans that document how the application would affect all operations, including those in Canada and Mexico. The Board needs these data to determine how operational changes in foreign nations would likely affect the U.S. rail network. In addition, consistent with our recent practice, we will require applicants to consult with FRA and file a safety integration plan. Also, because blocked railroad crossings have become an increasing concern to communities, applicants will be required to indicate what measures they plan to take to avoid blocking grade crossings that might otherwise result from merger-related changes in operations or increases in rail traffic. The full-system operating plans that we will require of applicants in major transactions must be submitted with the application, and the Safety Integration Plan and information on blocked crossings shall be submitted as part of the environmental review process.

***Renumbering prior § 1180.8(a) and (b).*** As a result of the insertion of new § 1180.8(a), which will be applicable to major transactions, we have renumbered the prior rules at § 1180.8(a) and § 1180.8(b) as new § 1180.8(b) and new § 1180.8(c), respectively. New § 1180.8(b) sets out operational data requirements for major and significant transactions. New § 1180.8(c) sets out operational data requirements for minor transactions.

**§ 1180.10 Service assurance plans.**

*For major transactions: Applicants must submit a Service Assurance Plan, which, in concert with the operating plan requirements, identifies the precise steps to be taken by applicants to ensure that projected service levels would be attainable and that key elements of the operating plan would improve service. The plan shall describe with reasonable precision how operating plan efficiencies would translate into present and future benefits for the shipping public. The plan must also describe any potential area of service degradation that might result due to operational changes and how instances of degraded service might be mitigated. Like the Operating Plan on which it is based, the Service Assurance Plan must be a full-system plan encompassing:*

*(a) Integration of operations. Based on the operating plan, and using appropriate benchmarks, applicants must develop a Service Assurance Plan describing how the proposed transaction would result in improved service levels and how and where service might be degraded. This description should be a precise route level review, but not a shipper-by-shipper review. Nonetheless, the plan should be sufficient for individual shippers to evaluate the projected improvements and changes, and respond to the potential areas of service degradation for their customary traffic routings. The plan should inform Class II and III railroads and other connecting railroads of the operational changes or changes in service terms that might affect their operations, including operations involving major gateways.*

*(b) Coordination of freight and passenger operations. If Amtrak or commuter services are operated over the lines of applicant carriers, applicants must describe definitively how they would continue to facilitate these operations so as to fulfill existing performance agreements for those services. Whether or not the passenger services are operated over lines of applicants or applicants' operations are on the lines of passenger agencies, applicants must establish operating protocols ensuring effective communications with Amtrak and/or regional rail passenger operators to minimize any potential transaction-related negative impacts.*

*(c) Yard and terminal operations. The operational fluidity of yards and terminals is key to the successful implementation of a transaction and effective service to shippers. Applicants must describe how the operations of principal classification yards and major terminals would be changed or revised and how these revisions would affect service to customers. As part of this analysis, applicants must furnish dwell time benchmarks for each facility described above, and estimate what the expected dwell time would be after the revised operations are implemented. Also required will be a discussion of on-time performance for the principal yards and terminals in the same terms as required for dwell time.*

*(d) Infrastructure improvements. Applicants must identify potential infrastructure impediments (using volume/capacity line and terminal forecasts), formulate solutions to those impediments, and develop time frames for resolution. Applicants must also develop a capital improvement plan (to support the operating plan) for timely funding and completion of the improvements critical to transition of operations. They should also describe improvements related to future growth, and indicate the relationship of the improvements to service delivery.*

*(e) Information technology systems. Because the accurate and timely integration of applicants' information systems is vitally important to service, applicants must identify the process to be used for systems integration and training of involved personnel. This must include identification of the principal operations-related systems, operating areas affected, implementation schedules, the realtime operations data used to test the systems, and pre-implementation training requirements needed to achieve completion dates. If such systems will not be integrated and on line prior to implementation of the transaction, applicants must describe the interim systems to be used and the adequacy of those systems to ensure service delivery.*

*(f) Customer service. To achieve and maintain customer confidence in the transaction and to ensure the successful integration and consolidation of existing customer service functions, applicants must identify their plans for the staffing and training of personnel within or supporting the customer service centers. This discussion must include specific information on the planned steps to familiarize customers with any new processes and procedures that they may encounter in using the consolidated systems and/or changes in contact locations, telephone numbers, or communication mode.*

*(g) Labor. Applicants must furnish a plan for reaching necessary labor implementing agreements. Applicants must also provide evidence that sufficient qualified employees would be available at the proper locations to effect implementation.*

*(h) Training. Applicants must establish a plan for providing necessary training to employees involved with operations, train and engine service, operating rules, dispatching, payroll and timekeeping, field data entry, safety and hazardous material compliance, and contractor support functions (e.g., crew van service), as well as training for other employees in functions that would be affected by the acquisition.*

*(i) Contingency plans for merger-related service disruptions. To address potential disruptions of service that could occur, applicants must establish contingency plans. Those plans, based upon available resources and traffic flows and density, must identify potential areas of disruption and the risk of occurrence. Applicants must provide evidence that contingency plans would be in place to promptly restore adequate service levels. Applicants must also provide for the establishment of problem resolution teams and describe the specific procedures to be utilized for problem resolution.*

*(j) Timetable. Applicants must identify all major functional or system changes/consolidations that would occur and the time line for successful completion.*

*(k) Benchmarking. Specific benchmarking requirements may vary with the transaction. The minimum for benchmarking will be the 12 monthly periods immediately preceding the filing date of the notice of intent to file the application. Benchmarking is intended to provide an historic monthly baseline against which actual post-transaction levels of performance can be measured. Benchmarking data should be sufficiently detailed and encompassing to give a meaningful picture of operational performance for the newly merged system. Applicants will report in a matrix structure giving the historic monthly (benchmark) data and provide for the reporting of actual monthly data during the monitoring period. It is important that data reflect*

*uniformly constructed measures of historic and post-transaction operations. Minimum benchmark data include:*

*(1) Corridor performance benchmarking - Benchmarks will consist of route level performance information including flow data for traffic moving on the applicants' systems. These data will encompass flows to and from major points. A major point could be a Bureau of Economic Analysis (BEA) statistical area, or it can be a railroad-created point based on an operational grouping of stations or interchanges, or it could be another similar construction. It will be necessary for applicants to define traffic points used to establish benchmarks for purposes of monitoring. A sufficient number of corridor flows must be reported so as to fully represent system flows, including interchanges with short lines and other Class I's, and internal traffic of the respective applicants before the transaction. In addition to identifying traffic flows by areas, they also must be identified by commodity sector (for example, merchandise, intermodal, automotive, unit coal, unit grain etc.). Data for each flow must include: traffic volume in carloads (units), miles (area to area), and elapsed time in hours. Only loaded traffic need be included.*

*(2) Yard and terminal benchmarking -*

*(i) Terminal dwell. Terminal dwell for major yards will be calculated in hours for cars handled, not including run-through and bypass trains or maintenance of way and bad order cars.*

*(ii) On time originations by major yard. On time originations are based on the departure of scheduled trains originating at a particular yard.*

*(3) System benchmarking -*

*(i) Cars on line.*

*(ii) Average train velocity, by train type.*

*(iii) Locomotive fleet size and applicable bad order ratios.*

*(iv) Passenger train performance for commuter and intercity passenger services.*

We are adding this new section to our rules to reflect the new Service Assurance Plan called for under § 1180.1(h) regarding service assurance and operational monitoring.

**§ 1180.11 Transnational and other informational requirements.**

*(a) For applicants whose systems include operations in Canada or Mexico, applicants must explain how cooperation with the Federal Railroad Administration would be maintained to address potential impacts on operations within the United States of operations or events elsewhere on their systems.*

*(b) All applicants must assess whether any restrictions or preferences under foreign or domestic law or policies could affect their commercial decisions, and discuss any ownership restrictions applicable to them.*

We are adding this new section to our rules to allow for our full consideration of an applicant's transnational operations, and for our consideration of any ownership restrictions or

pertinent governmental restrictions or preferences applicable to any applicant (foreign or domestic) that may affect our public interest assessment, particularly those that might unduly interfere with the market or that might create an unlevel playing field.

**Small entities.** The Board certifies that the revisions to our regulations will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). These rules have created additional filing requirements only for Class I applicants, which are very large rail carriers. At the same time we have given increased weight to issues and concerns of smaller railroads and shippers, a change that should benefit these small entities.

**Environment.** This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

**Board releases available via the Internet.** Decisions and notices of the Board, including this decision, are available on the Board's website at "www.stb.dot.gov."

**Authority.** 49 U.S.C. 721, 11323-11325.

**List of Subjects in 49 CFR Part 1180**

Administrative practice and procedure, Bankruptcy, Railroads, Reporting and recordkeeping requirements.

Decided: June 7, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes. Chairman Morgan commented and dissented in part with the following separate expression. Vice Chairman Clyburn and Commissioner Burkes commented with the following separate expressions.

Vernon A. Williams
Secretary

**Chairman Morgan, commenting and dissenting in part:**

The rules that we are adopting here are the culmination of a comprehensive process begun some 15 months ago and ending on schedule. As part of this process, we have imposed a moratorium on major rail mergers, conducted a three-stage rulemaking proceeding, held an oral argument, and received and reviewed written comments on a broad array of issues from over 100 parties in this proceeding, representing the wide-ranging views of railroads, rail users, rail labor, governmental agencies, Members of Congress, and other affected parties. We have benefitted greatly from this extensive public participation in formulating our new policy and rules for considering future major railroad merger proposals. The process, I believe, has exemplified good government at work, and we are all particularly indebted to the outstanding Board staff for their important contributions to this process and to this product.

Given the likelihood that the next round of major rail mergers could result in two transcontinental railroad systems, the Board's reexamination of its major rail merger policy has focused on three issues. First, we cannot afford the service and financial problems associated with the last round of rail mergers. Second, the policy must reflect competitive concerns with further consolidation. And finally, because of the risks and finality associated with the next round, the policy must ensure that future mergers add value and provide benefits that clearly outweigh any potential harm. There is little margin for error as we proceed ahead.

The new policy and rules we are adopting here reflect these objectives in several ways. They significantly increase the burden on applicants to demonstrate that a proposed transaction would be in the public interest, requiring applicants to demonstrate that new merger proposals would produce tangible benefits, such as improved service, and enhanced competition wherever that is necessary to offset negative effects of the merger, such as unmitigated competitive harm or service disruptions. In doing so, the new rules strike the proper balance between on the one hand the desire for specificity and on the other hand the need for the requisite flexibility to allow for private-sector initiative and innovation and to permit the Board to address individual merger proposals depending on the circumstances of a particular case. The new rules also require more accountability for benefits that are claimed and a showing that such benefits could not be realized by means other than a merger. And the new rules require more details up front regarding the service that would be provided, as well as contingency planning and problem resolution in the event of service failures. In sum, our action here reflects the lessons learned from the past in a way that allows for the needs of the marketplace of the future, and it ensures that, if further major mergers are pursued, our new policy and rules will permit the Board to properly evaluate whether such proposals are truly in the public interest.

While some may take the position that the new rules do not go far enough, others may view the heavier burden reflected in our new rules as foreclosing "good mergers." It is certainly not my intent to stifle private-sector initiatives and market-based transactions that are in the

public interest, and I believe that our final policy and rules appropriately reflect that approach. Whether additional major mergers are pursued depends, in large part, on how customers view more mergers, how the investment community assesses further consolidation in the industry, and the state of the economy. But I do hope our new rules remind railroads that mergers do not have to be the first choice or the only choice when they are considering ways to strengthen and improve their networks, particularly given the great risks associated with further consolidation.

Moreover, it is essential for the railroads to continue to focus on effectively and creatively running, day-to-day, the businesses that they now have, with a view toward more efficient operations, improved service, increased cooperation among themselves, and better customer and employee relations, all of which are necessary for the rail sector to thrive. While mergers have their place, recent events have shown that no major merger takes place in isolation, and that, once a round of mergers begins, it can be all-consuming, distracting, and disruptive, to the detriment of the nation's transportation system, rail shippers, rail employees, and communities across the country. Important progress has been made during the Board-imposed 15-month moratorium in stabilizing the rail network, enhancing service reliability, pursuing alliances and other cooperative arrangements among railroads, and promoting more positive relationships with rail workers, rail users, and others. We must be careful not to undo the important progress that has been made, and we must continue to promote an environment in which that progress can be furthered.

While I have voted to approve the overall package of rules as being in the public interest, I disagree with the special treatment being afforded KCS in the decision being issued today. This historical Class I railroad situated in the Nation's heartland serves a number of important markets and provides significant competitive routes and connections not only for North-South traffic but for East-West traffic as well. Indeed, as the self-styled NAFTA railway with its substantial ownership interest in the Texas Mexican Railway Company and Grupo Transportacion Ferroviaria Mexicana, as well as its control of Gateway Western and its marketing agreement and alliance with CN/IC, KCS is of such strategic importance that any merger between it and another Class I railroad could well trigger the next round of major rail mergers resulting in two transcontinental railroad systems. Giving KCS the opportunity to pursue waiver requests on a case-by-case basis at the time it proposes a specific merger transaction would seem appropriate. But I respectfully disagree with the conclusion reached by my colleagues as reflected in the decision being issued today that we need not worry about a transaction involving KCS and another major carrier, and thus that a blanket waiver from the new rules is presumed to be appropriate in the first instance. I do not believe that it is sound policy to give KCS such special treatment while applying the new rules to the other Class I railroads.

As we move forward, we must make sure that actions taken, whether in the private sector or by government, will result in a stronger rail network capable of meeting the service needs of

its customers and continuing to fulfill its important role in our economy well into the future. A continued focus on improved rail service, a merger policy that is reflective of the past and attentive to the future, and an overall regulatory framework that results in the kind of rail network that this Nation wants and needs are all important to that end. Taken as a whole, the policy and rules for major rail mergers that we are adopting meet this objective.

**Vice Chairman Clyburn, commenting:**

While some believe that this decision ends a long process of hearings and rulemaking proceedings culminating in the issuance of these final rules, I believe that the rules are a new beginning in our task of serving the public interest. As I remarked in our landmark decision, STB Ex Parte No. 582, which instituted a 15-month moratorium on mergers, "past rail consolidations have created a new paradigm" in which we must now operate. The quest we have followed throughout this process has been how to properly balance the public interest in this new era in the rail industry.

We have had a lively debate from all segments of the transportation industry. We have heard from freight railroads, large and small, passenger railroads, rail customers of various commodities and their associations, labor interests, economists, federal and foreign government agencies, state and local governments, ports, and Members of Congress. The testimony from each of these sources has indicated that we cannot proceed with the concept of "business as usual." I view these rules as a significant shift from prior merger policy.

I commend the railroads and rail labor for their historic agreement concerning the overrides of collective bargaining agreements. The Board takes notice of this agreement and should adjudicate any relevant matters accordingly. I hope the momentum created by this agreement can lead to a mutually agreeable solution to the moving issue; however, I remind the industry that the Board is prepared to act on this matter. The Board is taking a new step in stating that it is amenable to reviewing its interpretation of the New York Dock conditions regarding moving.

Applicants must be aware that it is critical that they fully address any potential service problems and other harms including the mitigation of such problems with proposals that would preserve and/or enhance competition. The Board is directing applicants to ensure that the benefits projected more accurately reflect the benefits realized shortly after consummation. The rail industry consists of many important components of which a viable shortline industry is an essential part. It is my hope that this decision will highlight the crucial symbiotic relationship between all the transportation stakeholders.

**Commissioner Burkes, commenting:**

The changes to the Board's major railroad consolidation rules and procedures set forth herein correctly shift the focus away from encouraging mergers to encouraging the enhancement of competition. It should be noted that the adopted rules are not significantly different from those first proposed in this proceeding on October 3, 2000. However, there is a noticeable change in the wording in that Class I railroads now will not be specifically "required" to include provisions to enhance competition. For example, the wording in Section 1180.1(c) has been changed from "merger applications *must* include provisions for enhancing competition" to "merger applications *should* include provisions for enhancing competition." (emphasis added) Therefore, enhanced competition is now an encouraged goal rather than a mandated standard.

I am not in favor of a mandated enhanced competition standard, absent a definition of that term in the rules. No where in these new rules is "enhanced competition" defined. The decision (but not the new rules) states that enhanced competition "*could be*" the enhancement of intramodal or rail-to-rail competition, such as the establishment of shared access areas, the granting of trackage rights, the removal of so-called "paper barriers" and other approaches. However, enhanced competition also "could be" the enhancement of intermodal competition or some other type of competition that may not even be related to transportation. If we are to impose an enhanced competition standard, future merger applicants should know what steps they need to take and shippers should know what to expect.

The decision leaves it to the Board's discretion as to what constitutes enhanced competition. In other words, the Board will know enhanced competition when it sees it. These rules certainly do not prohibit the merging of North American railroads into two systems. Under these rules, the Board could approve Transcontinental Merger A because it would enhance intermodal competition and then approve Transcontinental Merger B since it would enhance competition with Transcontinental Merger A. It is my hope that the Board will closely scrutinize future applications and use its conditioning power, if necessary, to preserve and enhance competition in a way that promotes a competitive and healthy railroad system.

There has been a raising of the bar in terms of the details and planning that must be included in future merger applications (e.g., the Service Assurance Plan). Based on the service problems associated with recent mergers, these changes are justified, however, I hope that these added requirements do not unnecessarily lengthen the merger review process or burden other interested parties.

For the reasons set forth in the preamble, Title 49, Subtitle B, Chapter X, Part 1180 of the Code of Federal Regulations is amended as follows:

PART 1180--RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

1. The authority citation for part 1180 continues to read as follows:

Authority: 5 U.S.C. 553 and 559; 11 U.S.C. 1172; 49 U.S.C. 721, 10502, 11323-11325.

2. Section 1180.0 is revised to read as follows:

**§ 1180.0 Scope and purpose.**

(a) General. The regulations in this subpart set out the information to be filed and the procedures to be followed in control, merger, acquisition, lease, trackage rights, and any other consolidation transaction involving more than one railroad that is initiated under 49 U.S.C. 11323. Section 1180.2 separates these transactions into four types: Major, significant, minor, and exempt. The informational requirements for these types of transactions differ. Before an application is filed, the designation of type of transaction may be clarified or certain of the information required may be waived upon petition to the Board. This procedure is explained in § 1180.4. The required contents of an application are set out in §§ 1180.6 (general information supporting the transaction), 1180.7 (competitive and market information), 1180.8 (operational information), 1180.9 (financial data), 1180.10 (service assurance plans), and 1180.11 (transnational and other informational requirements). A major application must contain the information required in §§ 1180.6(a), 1180.6(b), 1180.7(a), 1180.7(b), 1180.8(a), 1180.8(b), 1180.9, 1180.10, and 1180.11. A significant application must contain the information required in §§ 1180.6(a), 1180.6(c), 1180.7(a), 1180.7(c), and 1180.8(b). A minor application must contain the information required in §§ 1180.6(a) and 1180.8(c). Procedures (including time limits, filing requirements, participation requirements, and other matters) are contained in § 1180.4. All applications must comply with the Board's Rules of General Applicability, 49 CFR parts 1100 through 1129, unless otherwise specified. These regulations may be cited as the Railroad Consolidation Procedures.

(b) Waiver. We will waive application of the regulations contained in this subpart for a consolidation involving The Kansas City Southern Railway Company and another Class I railroad and will apply the prior regulations instead, unless we are shown why such a waiver should not be allowed. Interested parties must file any objections to this waiver within 10 days after the applicants' prefiling notification (see 49 CFR § 1180.4(b)(1)).

3. Section 1180.1 is revised to read as follows:

**§ 1180.1 General policy statement for merger or control of at least two Class I railroads.**

(a) General. To meet the needs of the public and the national defense, the Surface Transportation Board (Board) seeks to ensure balanced and sustainable competition in the railroad industry. The Board recognizes that the railroad industry (including Class II and III carriers) is a network of competing and complementary components, which in turn is part of a broader transportation infrastructure that also embraces the nation's highways, waterways, ports, and airports. The Board welcomes private-sector initiatives that enhance the capabilities and the competitiveness of this transportation infrastructure. Although mergers of Class I railroads may advance our nation's economic growth and competitiveness through the provision of more efficient and responsive transportation, the Board does not favor consolidations that reduce the transportation alternatives available to shippers unless there are substantial and demonstrable public benefits to the transaction that cannot otherwise be achieved. Such public benefits include improved service, enhanced competition, and greater economic efficiency. The Board also will look with disfavor on consolidations under which the controlling entity does not assume full responsibility for carrying out the controlled carrier's common carrier obligation to provide adequate service upon reasonable demand.

(b) Consolidation criteria. The Board's consideration of the merger or control of at least two Class I railroads is governed by the public interest criteria prescribed in 49 U.S.C. 11324 and the rail transportation policy set forth in 49 U.S.C. 10101. In determining the public interest, the Board must consider the various goals of effective competition, carrier safety and efficiency, adequate service for shippers, environmental safeguards, and fair working conditions for employees. The Board must ensure that any approved transaction would promote a competitive, efficient, and reliable national rail system.

(c) Public interest considerations. The Board believes that mergers serve the public interest only when substantial and demonstrable gains in important public benefits — such as improved service and safety, enhanced competition, and greater economic efficiency — outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms. Although further consolidation of the few remaining Class I carriers could result in efficiency gains and improved service, the Board believes additional consolidation in the industry is also likely to result in a number of anticompetitive effects, such as loss of geographic competition, that are increasingly difficult to remedy directly or proportionately. Additional consolidations could also result in service disruptions during the system integration period. Accordingly, to assure a balance in favor of the public interest, merger applications should include provisions for enhanced competition, and, where both carriers are financially sound, the Board is prepared to use its conditioning authority as necessary under 49 U.S.C. 11324(c) to preserve and/or enhance competition. In addition, when evaluating the public interest, the Board will consider whether the benefits claimed by applicants could be realized by means other than the proposed consolidation. The Board believes that other private-sector initiatives, such as joint

marketing agreements and interline partnerships, can produce many of the efficiencies of a merger while risking less potential harm to the public.

(1) Potential benefits. By eliminating transaction cost barriers between firms, increasing the productivity of investment, and enabling carriers to lower costs through economies of scale, scope, and density, mergers can generate important public benefits such as improved service, more competition, and greater economic efficiency. A merger can strengthen a carrier's finances and operations. To the extent that a merged carrier continues to operate in a competitive environment, its new efficiencies would be shared with shippers and consumers. Both the public and the consolidated carrier can benefit if the carrier is able to increase its marketing opportunities and provide better service. A merger transaction can also improve existing competition or provide new competitive opportunities, and such enhanced competition will be given substantial weight in our analysis. Applicants shall make a good faith effort to calculate the net public benefits their proposed merger would generate, and the Board will carefully evaluate such evidence. To ensure that applicants have no incentive to exaggerate these projected benefits to the public, the Board expects applicants to propose additional measures that the Board might take if the anticipated public benefits fail to materialize in a timely manner. In this regard, the Board recognizes, however, that applicants require the flexibility to adapt to changing marketplace or other circumstances and that it is inevitable that an approved merger may not necessarily be implemented in precisely the manner anticipated in the application. Applicants will be held accountable, however, if they do not act reasonably in light of changing circumstances to achieve promised merger benefits.

(2) Potential harm. The Board recognizes that consolidation can impose costs as well as benefits. It can reduce competition both directly and indirectly in particular markets, including product markets and geographic markets. Consolidation can also threaten essential services and the reliability of the rail network. In analyzing these impacts we must consider, but are not limited by, the policies embodied in the antitrust laws.

(i) Reduction of competition. Although in specific markets railroads operate in a highly competitive environment with vigorous intermodal competition from motor and water carriers, mergers can deprive shippers of effective options. Intramodal competition can be reduced when two carriers serving the same origins or destinations merge. Competition arising from shippers' build-out, transloading, plant siting, and production shifting choices can be eliminated or reduced when two railroads serving overlapping areas merge. Competition in product and geographic markets can also be eliminated or reduced by mergers, including end-to-end mergers. Any railroad combination entails a risk that the merged carrier would acquire and exploit increased market power. Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive and market options such as those involving the use of major existing gateways, build-outs or build-ins, and

the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Harm to essential services. The Board must ensure that essential freight, passenger, and commuter rail services are preserved wherever feasible. An existing service is essential if there is sufficient public need for the service and adequate alternative transportation is not available. The Board's focus is on the ability of the nation's transportation infrastructure to continue to provide and support essential services. Mergers should strengthen, not undermine, the ability of the rail network to advance the nation's economic growth and competitiveness, both domestically and internationally. The Board will consider whether projected shifts in traffic patterns could undermine the ability of the various network links (including Class II and Class III rail carriers and ports) to sustain essential services.

(iii) Transitional service problems. Experience shows that significant service problems can arise during the transitional period when merging firms integrate their operations, even after applicants take extraordinary steps to avoid those disruptions. Because service disruptions harm the public, the Board, in its determination of the public interest, will weigh the likelihood of transitional service problems. In addition, under paragraph (h) of this section, the Board will require applicants to provide a detailed service assurance plan. Applicants also should explain how they would cooperate with other carriers in overcoming serious service disruptions on their lines during the transitional period and afterwards.

(iv) Enhanced competition. To offset harms that would not otherwise be mitigated, applicants should explain how the transaction and conditions they propose would enhance competition.

(d) Conditions. The Board has broad authority under 49 U.S.C. 11324(c) to impose conditions on consolidations, including requiring divestiture of parallel tracks or the granting of trackage rights and access to other facilities. The Board will condition the approval of Class I combinations to mitigate or offset harm to the public interest, and will carefully consider conditions proposed by applicants in this regard. The Board may impose conditions that are operationally feasible and produce net public benefits, but will not impose conditions that undermine or defeat beneficial transactions by creating unreasonable operating, financial, or other problems for the combined carrier. Conditions are generally not appropriate to compensate parties who may be disadvantaged by increased competition. The Board anticipates that mergers of Class I carriers would likely create some anticompetitive effects that would be difficult to mitigate through appropriate conditions, and that transitional service disruptions might temporarily negate any shipper benefits. To offset such potential harms and improve the prospect that their proposal would be found to be in the public interest, applicants should propose conditions that would not simply preserve but also enhance competition. The Board seeks to

enhance competition in ways that strengthen and sustain the rail network as a whole (including that portion of the network operated by Class II and III carriers).

(e) Employee protection. The Board is required to provide a fair arrangement for the protection of the rail employees of applicants who are affected by a consolidation. The Board supports early notice and consultation between management and the various unions, leading to negotiated implementing agreements, which the Board strongly favors. Otherwise, the Board respects the sanctity of collective bargaining agreements and will look with extreme disfavor on overrides of collective bargaining agreements except to the very limited extent necessary to carry out an approved transaction. The Board will review negotiated agreements to ensure fair and equitable treatment of all affected employees. Absent a negotiated agreement, the Board will provide for protection at the level mandated by law (49 U.S.C. 11326(a)), and if unusual circumstances are shown, more stringent protection will be provided to ensure that employees have a fair and equitable arrangement.

(f) Environment and safety. (1) The National Environmental Policy Act, 42 U.S.C. 4321 et seq. (NEPA), requires the Board to take environmental considerations into account in railroad consolidation cases. To meet its responsibilities under NEPA and related environmental laws, the Board must consider significant potential beneficial and adverse environmental impacts in deciding whether to approve a transaction as proposed, deny the proposal, or approve it with conditions, including appropriate environmental mitigation conditions addressing concerns raised by the parties, including federal, state, and local government entities. The Board's Section of Environmental Analysis (SEA) ensures that the agency meets its responsibilities under NEPA and the implementing regulations at 49 CFR 1105 by providing the Board with an independent environmental review of merger proposals. In preparing the necessary environmental documentation, SEA focuses on the potential environmental impacts resulting from merger-related changes in activity levels on existing rail lines and rail facilities. The Board generally will mitigate only those impacts that would result directly from an approved transaction, and will not require mitigation for existing conditions and existing railroad operations.

(2) During the environmental review process, railroad applicants have negotiated agreements with affected communities, including groups of communities and other entities such as state and local agencies. The Board encourages voluntary agreements of this nature because they can be extremely helpful and effective in addressing specific local and regional environmental and safety concerns, including the sharing of costs associated with mitigating merger-related environmental impacts. Generally, these privately negotiated solutions between an applicant railroad and some or all of the communities along particular rail corridors or other appropriate entities are more effective, and in some cases more far-reaching, than any environmental mitigation options the Board could impose unilaterally. Therefore, when such agreements are submitted to it, the Board generally will impose these negotiated agreements as conditions to approved mergers, and these agreements generally will substitute for specific local

and site-specific environmental mitigation for a community that otherwise would be imposed. Moreover, to encourage and give effect to negotiated solutions whenever possible, the opportunity to negotiate agreements will remain available throughout the oversight process to replace local and site-specific environmental mitigation imposed by the agency. The Board will require compliance with the terms of all negotiated agreements submitted to it during oversight by imposing appropriate environmental conditions to replace the local and site-specific mitigation previously imposed.

(3) Applicants will be required to work with the Federal Railroad Administration, on a case-by-case basis, to formulate Safety Integration Plans (SIPs) to ensure that safe operations are maintained throughout the merger implementation process. As part of the environmental review process, applicants will be required to submit

(i) a SIP and

(ii) evidence about potentially blocked grade crossings as a result of merger-related traffic increases or operational changes.

(g) Oversight. As a condition to its approval of any major transaction, the Board will establish a formal oversight process. For at least the first 5 years following approval, applicants will be required to present evidence to the Board, on no less than an annual basis, to show that the merger conditions imposed by the Board are working as intended, that the applicants are adhering to the various representations they made on the record during the course of their merger proceeding, that no unforeseen harms have arisen that would require the Board to alter existing merger conditions or impose new ones, and that the merger benefit projections accepted by the Board are being realized in a timely fashion. Parties will be given the opportunity to comment on applicants' submissions, and applicants will be given the opportunity to reply to the parties' comments. During the oversight period, the Board will retain jurisdiction to impose any additional conditions it determines are necessary to remedy or offset adverse consequences of the underlying transaction.

(h) Service assurance and operational monitoring. (1) The quality of service is of vital importance. Accordingly, applicants must file, with their initial application and operating plan, a Service Assurance Plan identifying the precise steps they would take to ensure adequate service and to provide for improved service. This plan must include the specific information set forth at § 1180.10 on how shippers, connecting railroads (including Class II and III carriers), and ports across the new system would be affected and benefitted by the proposed consolidation. As part of this plan, applicants will be required to provide service benchmarks, describe the extent to which they have entered into any arrangements with shippers and shipper groups to compensate for service failures, and establish contingency plans that would be available to mitigate any unanticipated service disruption.

(2) The Board will conduct significant post-approval operational monitoring to help ensure that service levels after a merger are reasonable and adequate.

(3) The Board also will require applicants to establish problem resolution teams and specific procedures for problem resolution to ensure that any unanticipated post-merger problems related to service or any other transportation matters, including claims, are promptly addressed. These teams should include representatives of all appropriate employee categories. Also, the Board envisions the establishment of a Service Council made up of shippers, railroads, passenger service representatives, ports, rail labor, and other interested parties to provide an ongoing forum for the discussion of implementation issues.

(4) Loss and damage claims handling. Shippers or shortlines who have freight claims under 49 CFR 1005 during merger implementation shall file such claims, in writing or electronically, with the merged carrier. The claimant shall provide supporting documentation regarding the effect on the claimant, and the specific damages (in a determinable amount) incurred. Pursuant to 49 CFR 1005, the merged carrier shall acknowledge each claim within 30 days and successively number each claim. Within 120 days of carrier receipt of the claim, the merged carrier shall respond to each claim by paying, declining, or offering a compromise settlement. The Board will take notice of these claims and their disposition as a matter of oversight. During each annual oversight period, the merged carrier shall report on claims received, their type, and their disposition for each quarterly period covered by oversight. While shippers and shortlines may also contract with the applicants for specific remedies with respect to claims, final adjudication of contract issues as well as unresolved claims will remain a matter for the courts.

(5) Service failure claims. Applicants must suggest a protocol for handling claims related to failure to provide reasonable service due to merger implementation problems. Commitments to submit all such claims to arbitration will be favored.

(6) Alternative rail service. Where shippers and connecting railroads require relief from extended periods of inadequate service, the procedures at 49 CFR 1146 and 1147 are available for the Board to review the documented service levels and to consider shipper proposals for alternative service relief when other avenues of relief have already been explored with the merged carrier in an effort to restore adequate service.

(i) Cumulative impacts and crossover effects. Because there are so few remaining Class I carriers and the railroad industry constitutes a network of competing and complementary components, the Board cannot evaluate the merits of a major transaction in isolation. The Board must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to explain how additional Class I mergers would affect the eventual structure of the industry and the public interest. Applicants

should generally discuss the likely impact of such future mergers on the anticipated public benefits of their own merger proposal. Applicants will be expected to discuss whether and how the type or extent of any conditions imposed on their proposed merger would have to be altered, or any new conditions imposed, should we approve any future consolidation(s).

(j) Inclusion of other carriers. The Board will consider requiring inclusion of another carrier as a condition to approval only where there is no other reasonable alternative for providing essential services, the facilities fit operationally into the new system, and inclusion can be accomplished without endangering the operational or financial success of the new company.

(k) Transnational and other informational issues. (1) All applicants must submit "full system" competitive analyses and operating plans — incorporating any operations in Canada or Mexico — from which we can determine the competitive, service, employee, safety, and environmental impacts of the prospective operations within the United States, and explain how cooperation with the Federal Railroad Administration would be maintained to address potential impacts on operations within the United States of operations or events elsewhere on their systems. All applicants must further provide information concerning any restrictions or preferences under foreign or domestic law and policies that could affect their commercial decisions. Applicants must also address how any ownership restrictions might affect our public interest assessment.

(2) The Board will consult with relevant officials, as appropriate, to ensure that any conditions it imposes on an approved transaction are consistent with the North American Free Trade Agreement and other pertinent international agreements to which the United States is a party. In addition, the Board will cooperate with those Canadian and Mexican agencies charged with approval and oversight of a proposed transnational railroad combination.

(l) National defense. Rail mergers must not detract from the ability of the United States military to rely on rail transportation to meet the nation's defense needs. Applicants must discuss and assess the national defense ramifications of their proposed merger.

(m) Public participation. To ensure a fully developed record on the effects of a proposed railroad consolidation, the Board encourages public participation from federal, state, and local government departments and agencies; affected shippers, carriers, and rail labor; and other interested parties.

4. Section 1180.3 is amended by revising paragraphs (a) and (b) to read as follows:

**§ 1180.3 Definitions.**

(a) Applicant. The term applicant means the parties initiating a transaction, but does not include a wholly owned direct or indirect subsidiary of an applicant if that subsidiary is not a rail carrier. Parties who are considered applicants, but for whom the information normally required of an applicant need not be submitted, are:

(1) in minor trackage rights applications, the transferor and

(2) in responsive applications, a primary applicant.

(b) Applicant carriers. The term applicant carriers means: any applicant that is a rail carrier; any rail carrier operating in the United States, Canada, and/or Mexico in which an applicant holds a controlling interest; and all other rail carriers involved in the transaction. Because the service provided by these commonly controlled carriers can be an important competitive aspect of the transactions that we approve, applicant carriers are subject to the full range of our conditioning power. Carriers that are involved in an application only by virtue of an existing trackage rights agreement with applicants are not applicant carriers.

* * * * *

5. Section 1180.4 is amended by revising paragraph (a)(1) to read as follows, by removing paragraph (a)(4), by adding new paragraphs (b)(4) and (c)(6)(vi) to read as follows, and by revising paragraphs (d), (e)(2), (e)(3), and (f)(2) to read as follows:

**§ 1180.4 Procedures.**

(a) * * * (1) The original and 25 copies of all documents shall be filed in major proceedings. The original and 10 copies shall be filed in significant and minor proceedings.

* * *

(4) [Removed]

(b) * * *

(4) Prefiling notification. When filing the notice of intent required by paragraph (b)(1) of this section, applicants also must file:

(i) A proposed procedural schedule. A proposed procedural schedule. In any proceeding involving either a major transaction or a significant transaction, the Board will publish a Federal Register notice soliciting comments on the proposed procedural schedule, and will, after review of any comments filed in response, issue a procedural schedule governing the course of the proceeding.

(ii) A proposed draft protective order. A proposed draft protective order. The Board will issue, in each proceeding in which such an order is requested, an appropriate protective order.

(iii) A statement of waybill availability for major transactions. Applicants must indicate, as soon as practicable after the issuance of a protective order, that they will make their 100% traffic tapes available (subject to the terms of the protective order) to any interested party on written request. The applicants may require that, if the requesting party is itself a railroad, applicants will make their 100% traffic tapes available to that party only if it agrees, in its written request, to make its own 100% traffic tapes available to applicants (subject to the terms of the protective order) when it receives access to applicants' tapes.

(iv) Applicants may also propose the use of a voting trust at this stage, or at a later stage, if that becomes necessary. In each proceeding involving a major transaction, applicants contemplating the use of a voting trust must explain how the trust would insulate them from an unlawful control violation and why their proposed use of the trust, in the context of their impending control application, would be consistent with the public interest. Following a brief period of public comment and replies by applicants, the Board will issue a decision determining whether applicants may establish and use the trust.

(c) * * *

(6) * * *

(vi) The information and data required of any applicant may be consolidated with the information and data required of the affiliated applicant carriers.

(d) Responsive applications. (1) No responsive applications shall be permitted to minor transactions.

(2) An inconsistent application will be classified as a major, significant, or minor transaction as provided in § 1180.2(a) through (c). The fee for an inconsistent application will be the fee for the type of transaction involved. See 49 CFR 1002.2(f)(38)-(41). The fee for any other type of responsive application is the fee for the particular type of proceeding set forth in 49 CFR 1002.2(f).

(3) Each responsive application filed and accepted for consideration will automatically be consolidated with the primary application for consideration.

(e) * * *

(2) The evidentiary proceeding will be completed:

(i) within 1 year after the primary application is accepted for a major transaction;

(ii) within 180 days for a significant transaction; and

(iii) within 105 days for a minor transaction.

(3) A final decision on the primary application and on all consolidated cases will be issued:

(i) within 90 days after the conclusion of the evidentiary proceeding for a major transaction;

(ii) within 90 days for a significant transaction; and

(iii) within 45 days for a minor transaction.

* * *

(f) * * *

(2) Except as otherwise provided in the procedural schedule adopted by the Board in any particular proceeding, petitions for waiver or clarification must be filed at least 45 days before the application is filed.

* * * * *

6. Section 1180.6 is amended by revising paragraphs (b)(1), (b)(2), (b)(3), (b)(4), (b)(6), and (b)(8) to read as follows, and by adding new paragraphs (b)(9), (b)(10), (b)(11), (b)(12), and (b)(13) to read as follows:

**§ 1180.6 Supporting information.**

* * * * *

(b) * * *

(1) Form 10-K (exhibit 6). Submit: the most recent filing with the Securities and Exchange Commission (SEC) under 17 CFR 249.310 made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form 10-K subsequently filed with the SEC during the pendency of the proceeding.

(2) Form S-4 (exhibit 7). Submit: the most recent filing with the SEC under 17 CFR 239.25 made within the year prior to the filing of the application by each applicant or by any entity that is in control of an applicant. These shall not be incorporated by reference, and shall be updated with any Form S-4 subsequently filed with the SEC during the pendency of the proceeding.

(3) Change in control (exhibit 8). If an applicant carrier submits an annual report Form R-1, indicate any change in ownership or control of that applicant carrier not indicated in its most recent Form R-1, and provide a list of the principal six officers of that applicant carrier and of any related applicant, and also of their majority-owned rail carrier subsidiaries. If any applicant carrier does not submit an annual report Form R-1, list all officers of that applicant carrier, and identify the person(s) or entity/entities in control of that applicant carrier and all owners of 10% or more of the equity of that applicant carrier.

(4) Annual reports (exhibit 9). Submit: the two most recent annual reports to stockholders by each applicant, or by any entity that is in control of an applicant, made within 2 years of the date of filing of the application. These shall not be incorporated by reference, and shall be updated with any annual or quarterly report to stockholders issued during the pendency of the proceeding.

* * *

(6) Corporate chart (exhibit 11). Submit a corporate chart indicating all relationships between applicant carriers and all affiliates and subsidiaries and also companies controlling applicant carriers directly, indirectly or through another entity (with each chart indicating the percentage ownership of every company on the chart by any other company on the chart). For each company: include a statement indicating whether that company is a noncarrier or a carrier; and identify every officer and/or director of that company who is also an officer and/or director of any other company that is part of a different corporate family that includes a rail carrier. Such information may be referenced through notes to the chart.

* * *

(8) Intercorporate or financial relationships. Indicate whether there are any direct or indirect intercorporate or financial relationships at the time the application is filed, not disclosed elsewhere in the application, through holding companies, ownership of securities, or otherwise, in which applicants or their affiliates own or control more than 5% of the stock of a non-affiliated carrier, including those relationships in which a group affiliated with applicants owns more than 5% of the stock of such a carrier. Indicate the nature and extent of any such relationships, and, if an applicant owns securities of a carrier subject to 49 U.S.C. Subtitle IV, provide the carrier's name, a description of securities, the par value of each class of securities held, and the applicant's percentage of total ownership. For purposes of this paragraph, "affiliates" has the same meaning as "affiliated companies" in Definition 5 of the Uniform System of Accounts (49 CFR part 1201, subpart A).

(9) Employee impact exhibit. The effect of the proposed transaction upon applicant carriers' employees (by class or craft), the geographic points where the impacts would occur, the time frame of the impacts (for at least 3 years after consolidation), and whether any employee protection agreements have been reached. This information (except with respect to employee protection agreements) may be set forth in the following format:

EFFECTS ON APPLICANT CARRIERS' EMPLOYEES

| Current Location | Classification | Jobs Transferred to | Jobs Abolished | Jobs Created | Year |
|---|---|---|---|---|---|

(10) Conditions to mitigate and offset merger-related harms. Applicants are expected to propose measures to mitigate and offset merger-related harms. These conditions should not simply preserve, but also enhance, competition.

(i) Applicants must explain how they would preserve competitive options for shippers and for Class II and III rail carriers. At a minimum, applicants must explain how they would preserve the use of major existing gateways, the potential for build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement.

(ii) Applicants should explain how the transaction and conditions they propose would enhance competition and improve service.

(11) Calculating public benefits. Applicants must enumerate and, where possible, quantify the net public benefits their merger would generate (if approved). In making this estimate, applicants should identify the benefits that would arise from service improvements, enhanced competition, cost savings, and other merger-related public interest benefits, and should discuss whether the particular benefits they are relying upon could be achieved short of merger.

Applicants must also identify, discuss, and, where possible, quantify the likely negative effects approval would entail, such as losses of competition, potential for service disruption, and other merger-related harms. In addition, applicants must suggest additional measures that the Board might take if it approves the application and the anticipated public benefits identified by applicants fail to materialize in a timely manner.

(12) Downstream merger applications. (i) Applicants should anticipate whether additional Class I mergers are likely to be proposed in response to their own proposal and explain how, taken together, these mergers, if approved, could affect the eventual structure of the industry and the public interest.

(ii) Applicants are expected to discuss whether any conditions imposed on an approval of their proposed merger would have to be altered, or any new conditions imposed, if the Board should approve additional future rail mergers.

(13) Purpose of the proposed transaction. The purpose sought to be accomplished by the proposed transaction, such as improving service, enhancing competition, strengthening the nation's transportation infrastructure, creating operating economies, and ensuring financial viability.

* * * * *

7. Section 1180.7 is revised to read as follows:

**§ 1180.7 Market analyses.**

(a) For major and significant transactions, applicants shall submit impact analyses (exhibit 12) describing the impacts of the proposed transaction — both adverse and beneficial — on inter- and intramodal competition with respect to freight surface transportation in the regions affected and on the provision of essential services by applicants and other carriers. An impact analysis should include underlying data, a study of the implications of those data, and a description of the resulting likely effects of the proposed transaction on the transportation alternatives that would be available to the shipping public. Each aspect of the analysis should specifically address significant impacts as they relate to the applicable statutory criteria (49 U.S.C. 11324(b) or (d)), essential services, and competition. Applicants must identify and address relevant markets and issues, and provide additional information as requested by the Board on markets and issues that warrant further study. Applicants (and any other party submitting analyses) must demonstrate both the relevance of the markets and issues analyzed and the validity of their methodology. All underlying assumptions must be clearly stated. Analyses should reflect the consolidated company's marketing plan and existing and potential competitive alternatives (inter- as well as intramodal). They can address: city pairs, interregional

movements, movements through a point, or other factors; a particular commodity, group of commodities, or other commodity factor that would be significantly affected by the transaction; or other effects of the transaction (such as on a particular type of service offered).

(b) For major transactions, applicants shall submit "full system" impact analyses (incorporating any operations in Canada or Mexico) from which they must demonstrate the impacts of the transaction — both adverse and beneficial — on competition within regions of the United States and this nation as a whole (including inter- and intramodal competition, product competition, and geographic competition) and the provision of essential services (including freight, passenger, and commuter) by applicants and other network links (including Class II and Class III rail carriers and ports). Applicants' impact analyses must at least provide the following types of information:

(1) The anticipated effects of the transaction on traffic patterns, market concentrations, and/or transportation alternatives available to the shipping public. Consistent with § 1180.6(b)(10), these would incorporate a detailed examination of any competition-enhancing aspects of the transaction and of the specific measures proposed by applicants to preserve existing levels of competition and essential services;

(2) Actual and projected market shares of originated and terminated traffic by railroad for each major point on the combined system. Applicants may define points as individual stations or as larger areas (such as Bureau of Economic Analysis statistical areas or U.S. Department of Agriculture Crop Reporting Districts) as relevant and indicate the extent of switching access and availability of terminal belt railroads. Applicants should list points where the number of serving railroads would drop from two to one and from three to two, respectively, as a result of the proposed transaction (both before and after applying proposed remedies for competitive harm);

(3) Actual and projected market shares of revenues and traffic volumes for major interregional or corridor flows by major commodity group. Origin/destination areas should be defined at relevant levels of aggregation for the commodity group in question. The data should be broken down by mode and (for the railroad portion) by single-line and interline routings (showing gateways used);

(4) For each major commodity group, an analysis of traffic flows indicating patterns of geographic competition or product competition across different railroad systems, showing actual and projected revenues and traffic volumes;

(5) Maps and other graphic displays where helpful in illustrating the analyses in this section;

(6) An explicit delineation of the projected impacts of the transaction on the ability of various network links (including Class II and Class III rail carriers and ports) to participate in the competitive process and to sustain essential services; and

(7) Supporting data for the analyses in this section, such as the basis for projections of changes in traffic patterns, including shipper surveys and econometric or other statistical analyses. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

(8) If necessary, an explanation as to how the lack of reliable and consistent data has limited applicants' ability to satisfy any of the above requirements.

(c) For significant transactions, specific regulations on impact analyses are not provided so that the parties will have the greatest leeway to develop the best evidence on the impacts of each individual transaction. As a general guideline, applicants shall provide supporting data that may (but need not) include: current and projected traffic flows; data underlying sales forecasts or marketing goals; interchange data; market share analysis; and/or shipper surveys. It is important to note that these types of studies are neither limiting nor all- inclusive. The parties must provide supporting data, but are free to choose the type(s) and format. If not made part of the application, applicants shall make these data available in a repository for inspection by other parties or otherwise supply these data on request, for example, electronically. Access to confidential information will be subject to protective order. For information drawn from publicly available published sources, detailed citations will suffice.

8. Section 1180.8 is amended by redesignating paragraphs (a) and (b) as paragraphs (b) and (c), respectively, and by adding a new paragraph (a) to read as follows:

**§ 1180.8 Operational data.**

(a) Applications for major transactions must include a full-system operating plan — incorporating any prospective operations in Canada and Mexico — from which they must demonstrate how the proposed transaction would affect operations within regions of the United States and on a nationwide basis. As part of the environmental review process, applicants shall submit:

(1) A Safety Integration Plan, prepared in consultation with the Federal Railroad Administration, to ensure that safe operations would be maintained throughout the merger implementation process.

(2) Information on what measures they plan to take to address potentially blocked crossings as a result of merger-related changes in operations or increases in rail traffic.

* * * * *

9. A new § 1180.10 is added to read as follows:

**§ 1180.10 Service assurance plans.**

For major transactions: Applicants must submit a Service Assurance Plan, which, in concert with the operating plan requirements, identifies the precise steps to be taken by applicants to ensure that projected service levels would be attainable and that key elements of the operating plan would improve service. The plan shall describe with reasonable precision how operating plan efficiencies would translate into present and future benefits for the shipping public. The plan must also describe any potential area of service degradation that might result due to operational changes and how instances of degraded service might be mitigated. Like the Operating Plan on which it is based, the Service Assurance Plan must be a full-system plan encompassing:

(a) Integration of operations. Based on the operating plan, and using appropriate benchmarks, applicants must develop a Service Assurance Plan describing how the proposed transaction would result in improved service levels and how and where service might be degraded. This description should be a precise route level review, but not a shipper-by-shipper review. Nonetheless, the plan should be sufficient for individual shippers to evaluate the projected improvements and changes, and respond to the potential areas of service degradation for their customary traffic routings. The plan should inform Class II and III railroads and other connecting railroads of the operational changes or changes in service terms that might affect their operations, including operations involving major gateways.

(b) Coordination of freight and passenger operations. If Amtrak or commuter services are operated over the lines of applicant carriers, applicants must describe definitively how they would continue to facilitate these operations so as to fulfill existing performance agreements for those services. Whether or not the passenger services are operated over lines of applicants or applicants' operations are on the lines of passenger agencies, applicants must establish operating protocols ensuring effective communications with Amtrak and/or regional rail passenger operators to minimize any potential transaction-related negative impacts.

(c) Yard and terminal operations. The operational fluidity of yards and terminals is key to the successful implementation of a transaction and effective service to shippers. Applicants must describe how the operations of principal classification yards and major terminals would be changed or revised and how these revisions would affect service to customers. As part of this

analysis, applicants must furnish dwell time benchmarks for each facility described above, and estimate what the expected dwell time would be after the revised operations are implemented. Also required will be a discussion of on-time performance for the principal yards and terminals in the same terms as required for dwell time.

(d) Infrastructure improvements. Applicants must identify potential infrastructure impediments (using volume/capacity line and terminal forecasts), formulate solutions to those impediments, and develop time frames for resolution. Applicants must also develop a capital improvement plan (to support the operating plan) for timely funding and completion of the improvements critical to transition of operations. They should also describe improvements related to future growth, and indicate the relationship of the improvements to service delivery.

(e) Information technology systems. Because the accurate and timely integration of applicants' information systems is vitally important to service, applicants must identify the process to be used for systems integration and training of involved personnel. This must include identification of the principal operations-related systems, operating areas affected, implementation schedules, the realtime operations data used to test the systems, and pre-implementation training requirements needed to achieve completion dates. If such systems will not be integrated and on line prior to implementation of the transaction, applicants must describe the interim systems to be used and the adequacy of those systems to ensure service delivery.

(f) Customer service. To achieve and maintain customer confidence in the transaction and to ensure the successful integration and consolidation of existing customer service functions, applicants must identify their plans for the staffing and training of personnel within or supporting the customer service centers. This discussion must include specific information on the planned steps to familiarize customers with any new processes and procedures that they may encounter in using the consolidated systems and/or changes in contact locations, telephone numbers, or communication mode.

(g) Labor. Applicants must furnish a plan for reaching necessary labor implementing agreements. Applicants must also provide evidence that sufficient qualified employees would be available at the proper locations to effect implementation.

(h) Training. Applicants must establish a plan for providing necessary training to employees involved with operations, train and engine service, operating rules, dispatching, payroll and timekeeping, field data entry, safety and hazardous material compliance, and contractor support functions (e.g., crew van service), as well as training for other employees in functions that would be affected by the acquisition.

(i) Contingency plans for merger-related service disruptions. To address potential disruptions of service that could occur, applicants must establish contingency plans. Those

plans, based upon available resources and traffic flows and density, must identify potential areas of disruption and the risk of occurrence. Applicants must provide evidence that contingency plans would be in place to promptly restore adequate service levels. Applicants must also provide for the establishment of problem resolution teams and describe the specific procedures to be utilized for problem resolution.

(j) Timetable. Applicants must identify all major functional or system changes/consolidations that would occur and the time line for successful completion.

(k) Benchmarking. Specific benchmarking requirements may vary with the transaction. The minimum for benchmarking will be the 12 monthly periods immediately preceding the filing date of the notice of intent to file the application. Benchmarking is intended to provide an historic monthly baseline against which actual post-transaction levels of performance can be measured. Benchmarking data should be sufficiently detailed and encompassing to give a meaningful picture of operational performance for the newly merged system. Applicants will report in a matrix structure giving the historic monthly (benchmark) data and provide for the reporting of actual monthly data during the monitoring period. It is important that data reflect uniformly constructed measures of historic and post-transaction operations. Minimum benchmark data include:

(1) Corridor performance benchmarking Benchmarks will consist of route level performance information including flow data for traffic moving on the applicants' systems. These data will encompass flows to and from major points. A major point could be a Bureau of Economic Analysis (BEA) statistical area, or it can be a railroad-created point based on an operational grouping of stations or interchanges, or it could be another similar construction. It will be necessary for applicants to define traffic points used to establish benchmarks for purposes of monitoring. A sufficient number of corridor flows must be reported so as to fully represent system flows, including interchanges with short lines and other Class I's, and internal traffic of the respective applicants before the transaction. In addition to identifying traffic flows by areas, they also must be identified by commodity sector (for example, merchandise, intermodal, automotive, unit coal, unit grain etc.). Data for each flow must include: traffic volume in carloads (units), miles (area to area), and elapsed time in hours. Only loaded traffic need be included.

(2) Yard and terminal benchmarking -

(i) Terminal dwell. Terminal dwell for major yards will be calculated in hours for cars handled, not including run-through and bypass trains or maintenance of way and bad order cars.

(ii) On time originations by major yard. On time originations by major yard. On time originations are based on the departure of scheduled trains originating at a particular yard.

(3) System benchmarking -

(i) Cars on line.

(ii) Average train velocity, by train type.

(iii) Locomotive fleet size and applicable bad order ratios.

(iv) Passenger train performance for commuter and intercity passenger services.

10. A new § 1180.11 is added to read as follows:

**§ 1180.11 Transnational and other informational requirements.**

(a) For applicants whose systems include operations in Canada or Mexico, applicants must explain how cooperation with the Federal Railroad Administration would be maintained to address potential impacts on operations within the United States of operations or events elsewhere on their systems.

(b) All applicants must assess whether any restrictions or preferences under foreign or domestic law or policies could affect their commercial decisions, and discuss any ownership restrictions applicable to them.